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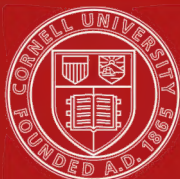
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MANUAL
OF THE
LAW OF EVIDENCE.

MANUAL
OF THE
LAW OF EVIDENCE
FOR THE USE OF STUDENTS

BEING
AN ABRIDGEMENT OF THE SIXTH EDITION
OF THE AUTHOR'S LARGER TREATISE
UPON THE SAME SUBJECT

BY
SIDNEY L. PHIPSON, M.A. (CANTAB.)
OF THE INNER TEMPLE, BARRISTER-AT-LAW

THIRD EDITION

LONDON
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BY THE SAME AUTHOR.

Royal 8vo.

PHIPSON'S LAW OF EVIDENCE

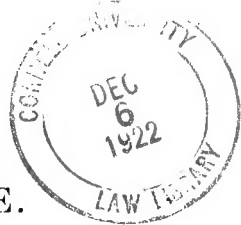
SIXTH EDITION.

PROFESSOR WIGMORE, in *The Harvard Law Review*, says: "It is the best book now current on the Law of Evidence in England. Since the last edition, more than one thousand cases have been added, making in all some fifty-seven hundred cases and statutes cited; and these citations excel in their careful exhaustion of all the minor sources, such as the Law Journals, the Times, and the Justice of the Peace Reports. . . The most valuable feature of Taylor's treatise, the English statutory citations, now appears here also with equal fulness. A casual testing finds no omission of the latest English decisions. . . Indeed, the painstaking search for every vestige of a ruling is apparent on every page. As a lawyer's handbook it is difficult to suppose that this work can be improved upon. . . Mr. Phipson's work has thoroughly freed itself from the unreasoning conventions and meaningless fictions of the older law, and has taken careful account of all the established results of modern theory. In this respect his book should be highly valued by the practitioner for its safe and enlightening guidance."

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"A treatise on evidence which as passed through five English editions in less than twenty years must have merits which make a strong appeal to the profession. While the freshness and fulness of the work, its abundant use of cases and its apposite grouping and arrangement of authorities make it a valuable work of reference for law students, it is distinctly a practitioner's handbook. With its 6,000 citations, which, the author believes, 'practically exhaust the English case-law of the subject,' and with its avoidance of theorizing and speculation, it supplies the greatest quantity of digested and ready-to-be-used information as to the law of evidence of any book with which the writer is acquainted. . . . The index, already one of the best of its kind, has been enlarged and made still more useful."—*Columbia Law Review*.



PREFACE.

THERE is, perhaps, no subject which the student finds less easy to assimilate, in a limited time, than the Law of Evidence. This may, to some extent, be due to the nature of the subject itself; but it is, I fancy, attributable much more to the paucity of really helpful elementary works thereon. The standard text-books are too voluminous and discursive readily to yield the necessary information. On the other hand, the well-known Digest of the late Sir James Stephen, incomparably the best summary of the law extant, is, from the special form in which it is cast, an extremely difficult book for the beginner to master. Written to be enacted verbatim as a statutory code, it necessarily contains no statement of principles, no explanatory detail, and the barest possible guidance to the scope and play of the various rules. Yet it is precisely here that the student most requires aid. The present compendium is an attempt to supply this.

The general arrangement of topics is the same as that in the sixth edition of my larger work; and in order to facilitate reference thereto, the corresponding pages in the main work are indicated by figures in heavy type at the heads of chapters and elsewhere.

A Preliminary Outline of the Subject has been added, which it is hoped may prove useful to students; and the cases and statutes are brought down to March, 1921.

SIDNEY L. PHIPSON.

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April, 1921.

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PRELIMINARY OUTLINE OF THE LAW OF EVIDENCE.

THE subject of Evidence is treated in the following pages under the three divisions of Production, Admissibility and Effect, of which the second is by far the largest and most important.

The rules of **PRODUCTION** deal first with what need not be produced, viz. : evidence of facts which are either *Admitted* for the purposes of the trial, or *Judicially Noticed*. As to matters of which Evidence may be given, the leading rule is that the *Burden of Proof*, in the sense of introducing Evidence, rests on the party who alleges a fact, and not on him who denies it, save where the fact alleged is presumed by law, or lies peculiarly within the knowledge of his opponent. There is, in theory, a further rule, viz. : that the *Best Evidence* must be given of which the nature of the case permits. This used to be largely true, but is now no longer so; and beyond the caution that a party who would win his case, had best produce the strongest evidence he can, there is little in the way of compulsion to be noticed [*post*, 7—13].

Coming to **ADMISSIBILITY**, evidence consists roughly of *Facts* which have occurred before the trial, and *Testimony* and *Documents* by means of which these facts are established in Court. Of (A) **Facts**, there is one general provision to be noted, viz. : that those admissible must be either *in issue*, *relevant to the issue* (i.e., logically probative thereof), or necessary for the legal proof of such as are so. In civil cases, direct testimony as to the facts in issue is usually

forthcoming; in criminal cases resort to relevant facts (*i.e.*, indirect, circumstantial, or presumptive evidence) is more largely required. It is not possible satisfactorily to classify relevant facts, since their variety may be infinite; but in practice they tend to group themselves under three principal heads or issues, dealing respectively with the *Existence* of the main fact, the *Identity* of the parties, or their *States of Mind* (*e.g.*, knowledge, intent, fraud, or malice) with reference to the main fact.

With regard to the *Existence* of the main fact, this is often provable by direct testimony; but, in any case, whatever was said or done by the parties at the time, is generally admissible as part of the transaction, or *res gesta*. Extrinsic matters, however, may often be relevant, *e.g.*, in civil cases, custom, to add unexpressed terms to a contract, or acts of ownership to show title to property. Questions of *Identity* arise chiefly in criminal cases, and on such questions in addition to opinion evidence on the point, a quite different set of facts becomes relevant, *e.g.*, those showing motive, preparation, possession of property connected with the crime, flight, change of name by the accused; or, in his favour, *alibi*. In both civil and criminal cases, also, *States of Mind* come constantly in question; and here a wide range of previous and subsequent facts is receivable [*post*, 16—42].

Facts, although logically relevant to the issue, however, are not invariably admissible; and there are five classes thereof, viz. Similar Facts, Character, Privileged Matters, Hearsay and Opinions, which are shut out by as many excluding rules, either because they tend to embarrass the case with collateral issues, or prejudice the parties with the jury, or are too dangerous and uncertain to form the basis of judicial decisions.

Thus: (1) Facts *similar* to the main fact are, in general, rejected to show either the existence of the main fact, or the identity of the parties, though admitted to show their state of mind with reference to the main fact. So (2) The *Character* of the parties is, in general, inadmissible unless actually in issue. And

various matters, otherwise relevant, are protected from disclosure by (3) *Public policy or Privilege*, e.g., State Secrets, confidential Communications between either Solicitor and Client, or husband and wife, and self-criminatory answers by witnesses [*post*, 43—59].

(4) *Hearsay*. The rule against hearsay, which is perhaps the most important in the whole subject, requires more lengthened consideration. This rule excludes, with certain exceptions, all statements made by persons not called as witnesses, as evidence of the *truth* of the facts stated. In applying it, a distinction must be observed between what is often called "*Original*" evidence and *Hearsay* [*post*, 2, 25, 60].

A statement, it must be remembered, is a fact of a dual nature, involving not merely the *relevancy* of the fact asserted, but also the *truth* of the assertion made; and here admissibility depends on whether the first or the second quality is relied on, in other words, on the *purpose* for which the statement is tendered. If it is tendered merely as original evidence, i.e., as relevant to the issue irrespective of its truth or falsity, it will, with certain safeguards (*post*, 25), be admissible, or not, like any other relevant fact, or piece of circumstantial evidence. If, on the other hand, it is tendered not circumstantially, but testimonially, i.e., as evidence of the *truth* of the matter stated, it will fall under the ban of hearsay and be excluded, unless brought within some recognized exception thereto. For example:—A. sues B. for having him falsely imprisoned on a charge of forging C.'s acceptance to a bill of exchange. B., in mitigation of damages, proves that C. (not called as a witness) refused to pay the bill, stating that A. had forged his name: held, that C.'s statement was admissible to show B.'s *bona fides* in making the charge, but not to prove the forgery [*Perkins v. Vaughan*, *post*, 19; *cp. also*, *R. v. Labouchere*, *post*, 33; *R. v. Buckley*, *post*, 35; *Vacher v. Cocks*, *post*, 34; *R. v. Plumer*, *post*, 61; *Keen v. Keen*, *post*, 103; and see further, *post*, 2, 17, 25, 60, 100]. Similarly, in cases of Rape, *complaints*, made shortly after the outrage by the woman

assaulted, are admissible to confirm her testimony or disprove consent, but are no evidence of the truth of the matters complained of (*post*, 28). In the above examples, the statements were received as original evidence, but would have been excluded as hearsay if tendered testimonially.

The Hearsay rule, however, is subject to three important groups of exceptions under which the statements of non-witnesses may become admissible to prove the truth of the facts asserted if made (a) by a *party to the case* as an Admission or Confession; or (b) by a *deceased person* under special circumstances; or (c) in a *Public Document*. As to Admissions, the rule is that statements by a party to the proceedings are evidence *against* but not *for* him; the reason being that what is said by a person may always be presumed to be true as against himself, but not when tendered in his own favour, otherwise everyone when in a difficulty might “*make evidence for himself*.” In criminal cases, admissions made after the crime are called confessions, and to be receivable must have been made voluntarily [*post*, 62—81].—As to (b) statements by *deceased persons*, these, if made against their pecuniary interest, or in the course of duty, or as to public rights, pedigree, or homicide committed on themselves, are receivable to prove the facts stated, the truth of the declarations being deemed to be guaranteed by the special circumstances under which they were made [*post*, 82—104].—The third exception to the hearsay rule relates to (c) statements contained in *Public Documents*, *e.g.*, Statutes, Government Gazettes, Public Registers and the like, which are receivable to prove the truth of the facts stated on the general ground that they are made by the authorized agents of the public, in the course of official duty, and as to matters of public interest [*post*, 105—115].

(5) *Opinions and Judgments*.—The last of the classes of facts shut out by the rules above indicated, consists of Opinion Evidence, which, either in the form of general reputation, or of individual opinion and belief, is in general inadmissible to prove material facts, since

if founded on no evidence or illegal evidence it is worthless, and if founded on legal evidence it tends to usurp the functions of the tribunal whose business alone it is to draw conclusions of law or fact. There are some exceptions in the case of General Reputation, which is admissible to prove public rights, matters of pedigree and marriage, and some in the case of Individual Opinion, which is admissible from Experts upon questions of science, art, trade, handwriting, and foreign law, and from Ordinary Witnesses (Non-Experts) on questions of identity, handwriting, age, and rate of speed [*post*, 116—24]. When opinion evidence takes the form of a Judgment of a court of law, more technical rules apply; but, broadly speaking, judgments *in rem* (*i.e.*, those affecting status) are conclusive evidence of the fact actually decided, when tendered in future proceedings between either parties or strangers, while judgments *in personam* (*i.e.*, those in contract, tort, or crime) are conclusive evidence both of the fact found and of the grounds of the finding, but only between parties, being, in general, wholly inadmissible between strangers [*post*, 125—34].

The above are the chief cases in which *relevant* facts are *excluded* in proof of the facts in issue; but there are many cases in which facts, though logically *irrelevant* to the issue, are yet legally *admitted*, *e.g.*, the fact that a witness has or has not been sworn in a particular manner, or that a hearsay declarant is dead at the date of the trial, or that proper search has or has not been made for a lost document. These are arbitrary requirements imposed not by logic, but by law, and may change in different jurisdictions, or at different periods [*post*, 14—15].

(B) **Testimony.**—With regard to witnesses, all persons are now competent to testify, except those of *defective intellect*, and, to a certain extent, *prisoners and their consorts*. As to the latter, the subject is regulated by the Criminal Evidence Act of 1898, and is somewhat detailed. But, generally, the accused, though incompetent for the prosecution, may give evidence for the defence either of himself or of a

co-defendant, subject to cross-examination, but with protection from certain questions thereon. The consort of the accused may also, with the latter's consent, give evidence for the defence, but not for the prosecution, save in certain scheduled cases. And co-defendants are also competent for the accused, but can only be called on their own application. Witnesses; with a few exceptions, *e.g.*, in the case of very young children, or when merely producing a document, are required to testify on oath or affirmation. As to the order of testimony, they must first be examined *in chief* by the party calling them, but may not be asked leading questions, though they may refresh their memory by memoranda made at the time of the events narrated. Nor may a party calling a witness discredit him, unless in the opinion of the judge he proves hostile. The witness is next *cross-examined* by the opposite party, when he may be asked leading questions, and when contradictory statements, bias, or previous convictions may be put to him, and if denied proved; otherwise answers going merely to credit, and not themselves relevant to the issue, cannot be contradicted. The witness, however, is in general compellable to *answer* questions of either kind put to him in cross-examination. He is then *re-examined* by his own side, when he has the opportunity of explaining any disadvantageous matters which have been elicited on cross-examination. As a general rule, Courts may act on the testimony of a single witness, even though uncorroborated; but in cases of treason, perjury, bastardy, breach of promise, or where the witness is an accomplice, corroboration is required either by rule of law, or invariable practice [*post*, 135—157].

(C) **Documents.**—Questions of evidence, here, mainly arise with regard to the Execution, Contents, or Admission of extrinsic facts to affect, documents. As to *Execution*, Public and Judicial documents are sometimes (*e.g.*, Statutes) judicially noticed, in other cases they may require no further authentication than that of appearing in a Government Gazette, or of “purporting” to be printed by official printers, or to be certified,

signed, or sealed by some court or public department. The execution of Private documents is proved by evidence of their signature given by some person who knows the writing, or in the case of documents requiring attestation, by calling the attesting witness. Ancient documents, (*i.e.*, over 30 years old), however, if produced from proper custody, prove themselves. The *Contents* of Public or Judicial documents are usually proved by secondary evidence, *e.g.*, duly authenticated copies; those of private documents by primary evidence, *e.g.*, production of the original, secondary evidence being, however, admissible where the document has been lost or destroyed, or is in the possession of the opposite party, who refuses to produce it after notice. The most important provisions, however, are those relating to the admissibility of *Extrinsic Evidence to affect documents*, and in this connection there are two rules of exclusion and one of admission. The first rule excludes extrinsic (or parol) evidence in *substitution* of documents, *i.e.*, if a transaction has been reduced to a documentary form, it must be proved by production of the document or a copy, and not by oral evidence of the transaction, even though the oral and written terms might be identical. The second rule excludes extrinsic evidence to *contradict, vary, enlarge, or restrict* the written terms. Both rules are subject to certain exceptions. Thirdly, there is a general rule admitting extrinsic evidence in aid of the *interpretation* of documents wherever their language is peculiar, or their application to the circumstances of the case is ambiguous or inaccurate. This controlling rule is worked out in six subordinate rules, too detailed to be given here, but concluding the difficult subject of extrinsic evidence to affect documents [*post*, 158—201].

EFFECT.—Finally, a word must be said as to the effect of evidence. In so far, then, as the *natural* weight or effect of evidence goes, this is not controlled by any arbitrary rules whatever, but is determined purely by the common sense, logic, and experience of the tribunal. But in many cases the law directs particular consequences to be annexed to individual facts, these

being called *presumptions of law*; and when “conclusive,” as that a child under seven is incapable of committing a felony, no opposing evidence at all is allowed to be given; but when merely “rebuttable,” as that a child born in lawful wedlock is legitimate, or a person not heard of for seven years is dead, the effect of the presumption is provisional only, that is, it throws on the party against whom it operates the burden of proving the contrary if he can, and only if he fail to do so will it become absolute. Lastly, the weight of evidence may be arbitrarily affected by the principle of Estoppel, by which a party is, within certain limits, precluded from denying some fact he has previously asserted. As this topic is usually treated in works on evidence, a brief summary of its rules is included in the present manual [*post*, 202—8].

NOTE.

- (i) References at the heads of Chapters, or end of Rules, thus [1-10], indicate the pages of the Sixth Edition of the Author's larger work where the corresponding topics are more fully treated.
- (ii) Letters at the end of headings in the text, thus (a), (b), (c), as on p. 17, refer to corresponding letters in the *Examples*.

ERRATA.

Page 3, line 7, for xxviii read xxvii.

Page 60, line 7, for xii read xxvii.

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MANUAL
OF
THE LAW OF EVIDENCE.

BOOK I.
PRODUCTION OF EVIDENCE.

CHAPTER I.

INTRODUCTORY.

[1-17.]

LAW,—Substantive and Adjective.—Law is commonly divided into Substantive Law, which defines rights, duties, and liabilities; and Adjective Law, which defines the procedure, pleading, and proof, by which the substantive law is applied in practice.

PROOF is effected by—(a) evidence, (b) presumptions, (c) judicial notice, and (d) inspection.

(a) **Evidence** means the facts, testimony, and documents which may be legally received in order to prove or disprove the facts under enquiry.

[Mr. Taylor applies the word to “all the legal means exclusive of mere argument, which tend to prove or disprove any fact the truth of which is submitted to judicial investigation.” (s. 1.) This, however, is too wide, since, though it excludes “mere argument” (*i.e.*, presumptions of fact), it would include presumptions of law, judicial notice, and inspection, which are not usually treated under the head of Evidence. On the

other hand, the word is sometimes, though it is submitted unduly, restricted to facts, exclusive of testimony (Hunter, Roman Law, 3rd ed. 1050); and sometimes to testimony and documents exclusive of facts (Steph. Digest, art. 1; this, it may be remarked, conflicts with other parts of the Digest, *e.g.*, an admission which by art. 15 is a relevant "fact," is declared by art. 64 to be primary "evidence;" while, elsewhere, after asking "what is evidence?" it is added, "the only possible answer is that one fact is or is not relevant to the other:" Introd. p. xii.).]

The following distinctions are commonly taken with respect to the nature of evidence:—

**Direct, Circumstantial, and Real Evidence.*—By direct evidence is meant that a given fact is proved either by its actual production, or by the testimony, or admissible declaration, of some one who has himself perceived it. By indirect, circumstantial, or presumptive evidence, is meant that other facts are so proved, from which the existence of the given fact may be logically inferred. The two forms are equally admissible, and the testimony, whether to the *factum probandum* or the *facta probantia*, is equally direct; but the advantage of the former is, that it contains only one source of error, fallibility of testimony, while the latter has, in addition, fallibility of inference. Little is to be gained from a comparison of their agency, since both forms admit of every degree of probability, from the lowest to the highest. Material objects, other than documents, produced for the inspection of the Court, are often called *Real evidence*.

Original and Hearsay Evidence. *Statements used circumstantially and used testimonially.*—The term Original evidence, as distinguished from Hearsay, is used in two senses: (1) to mean the proof of facts by witnesses, as opposed to their proof by statements made out of Court; and (2) to mean statements made out of Court which are used *circumstantially* (*i.e.*, as relevant irrespective of their truth or falsity), as opposed to those used *testimonially* (*i.e.*, to prove the truth of the facts asserted). Thus, the information, whether true

or false, on which a party acted is often material to explain his conduct, and is then original evidence; while if the same statement be used to prove its own truth, it is hearsay and only admissible in exceptional cases. The test of whether a declaration belongs to one class or the other is, therefore, the purpose for which it is tendered (*ante*, xxviii; *post*, 25, 60). The present distinction, though not always sufficiently recognized, or easy to apply, is one of the most important in the whole subject.

Primary and Secondary Evidence.—These terms apply to the kinds of proof that may be given of the *contents* of a document, irrespective of the *purpose* for which such contents, when proved, may be used.—Primary evidence means the best or highest kind, that which the law regards as affording the greatest certainty of the fact in question; thus, production of the original document, or proof of an admission of its contents by the party against whom it is tendered, is considered primary in this sense. Secondary evidence means inferior or substitutionary evidence, that which itself indicates the existence of more original sources of information; thus, a copy, or the testimony of a witness who has read the document, is secondary. In *Lucas v. Williams*, 1892, 2 Q. B. p. 116, Lord Esher remarked, "Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence, when a proper explanation of its absence has been given." This, however, is only approximately true, for the law sometimes requires secondary evidence to be given first, and sometimes allows the production of primary evidence to be optional (*post*, chap. XXVI.).

(b) **Presumptions** are either of law or of fact.

Presumptions of law are arbitrary consequences expressly annexed by law to particular facts; and may be either *conclusive*, as that a child under seven is incapable of committing a felony; or *rebuttable*, as that a person not heard of for seven years is dead, or that a bill of exchange has been given for value. They are

sometimes defined as *inferences*, directed by law to be drawn from particular facts (Steph. art. 1; Best, ss. 304—306); but, strictly speaking, a compulsory inference is a contradiction in terms, the law having no mandamus to the logical faculty. It would be more correct to say that the law requires Courts to abstain from drawing inferences, and to accept one fact as the legal equivalent of another (Thayer, Pr. Tr. Ev. 314—5, 317).

Presumptions of fact are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. They are always rebuttable.

(c) **Judicial Notice** is the cognizance taken by the Court itself of certain matters which are so notorious, or clearly established, that evidence of their existence is unnecessary.

(d) **Inspection**.—Inspection has been defined as a substitution of the eye for the ear in the reception of evidence, and is generally allowed whenever it will assist the tribunal in arriving at a decision. Valuable inferences are frequently derived through this channel from the demeanour of witnesses, the comparison of handwriting, or the condition of instruments used in committing a crime. Under the Children Act, 1908, s. 123, and in certain other cases, the *age* of persons may be determined by inspection.

PROOF IN CIVIL AND CRIMINAL CASES.—

The rules of proof are in general the same in civil and criminal proceedings, but the following differences should be noted:—

(1) In civil, but not in criminal, cases the rules of evidence may be relaxed by *consent of parties*, or *order of the Court*. Thus the parties may agree to try their case upon affidavits; may make admissions for the purpose of dispensing with proof at the trial; or may obtain leave in chambers to interrogate each other before trial, or, in certain cases, to prove particular facts at the trial by affidavit or hearsay, and documents by secondary evidence. Stamp objections, also, can only be taken in civil cases.

(2) The provisions relating to *complaints*, *character*,

confessions, dying declarations, and the competency and compellability of witnesses are wholly, or partially, peculiar to the criminal law. In criminal trials, also, the accused may make unsworn statements in lieu of, or in addition to, his sworn testimony.

(3) Civil issues may be proved by a *preponderance of evidence*; criminal issue, when arising in criminal proceedings, must be proved *beyond a reasonable doubt*. It has been said that criminal issues, when arising in civil proceedings, must also be strictly proved (Tay. s. 112; Steph. art. 94); but the better opinion is, perhaps, *contra*.

FUNCTIONS OF JUDGE AND JURY. LAW AND FACT.—Matters of law are determinable by the judge; matters of fact (with the exceptions mentioned below) by the jury.

Questions as to the production and admissibility of evidence belong to the former class; questions as to its credibility and weight to the latter. Whether there is *any* evidence, therefore, is for the judge; whether there is *sufficient* evidence is for the jury. Thus, in actions of negligence, it is for the former to say whether, from any given state of facts, negligence *can* be inferred, and for the latter to find whether it *ought* to be (*Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193, 200); so, in libels, civil or criminal, it is for the former whether the words were *capable* of the meaning alleged, and for the latter whether they *bore* it (*Nevill v. Fine Art Co.*, 1897, A. C. 68). The construction of written documents is for the Court; the construction of peculiar or technical terms is for the jury.

The following matters of *fact* are, by exception, determinable by the judge:—

(1) *What is reasonable* in certain cases, *e.g.*, the question of reasonable and probable cause in actions for malicious prosecution or false imprisonment; the question of reasonable suspicion under the Pawnbrokers Act, 1872; the question of the reasonableness of a covenant in restraint of trade.

(2) The existence of all *facts on which the admissibility of evidence depends*; *e.g.*, those which show

whether a confession was voluntary, a communication privileged, or a dying declaration made without hope of recovery.

(3) *Foreign law* (i.e., Scotch, Irish when differing from English, Colonial and Foreign), which, unlike English Law, is treated as a question of fact to be proved by experts, is determinable by the judge alone (Administration of Justice Act, 1920, s. 15. This adopts the rule in *Copin v. Adamson*, 31 L. T. 242, not that in *R. v. Picton*, 30 How. St. Tr. 536-40; *Rose-Troup v. Sleeping Car Co.*, Times, Feb. 3, 1911, and Tay. s. 48, where foreign law is said to be for the jury).

CHAPTER II.

MATTERS OF WHICH EVIDENCE IS UNNECESSARY.

[18-26.]

No evidence is required of matters which are either—
(a) admitted for the purposes of the trial, or (b) judicially noticed.

(a) **ADMISSIONS FOR PURPOSES OF TRIAL.**—Admissions for the purpose of dispensing with proof at the trial, may be made as follows:—

In **Civil Cases**, (1) By the pleadings; (2) Pursuant to notice under O. 32, rr. 1-5 (such admissions are only available for the particular person giving, and cause affected by, the notice, and the admissions may be amended or withdrawn on terms: r. 4); (3) By agreement, or otherwise, before, or at, the trial, and with reference thereto, by the parties or their agents.

Admissions for the above purpose must be distinguished from those tendered as evidence, the former not being usually receivable in *other* proceedings and the latter not being usually *conclusive*.

In **Criminal Cases**, except by a plea of guilty, no such admissions are allowed in cases of felony; and in *R. v. Thornhill*, 8 C. & P. 575, the same rule was applied to a case of misdemeanour. A plea of guilty, however, only admits the offence charged, and not the truth of the depositions (*R. v. Riley*, 18 Cox 285).

(b) **JUDICIAL NOTICE.**—It is competent for Courts to take judicial notice of the various matters enumerated below, these being so notorious or clearly established that formal evidence thereof is unnecessary.

Scope of the Rule.—The doctrine of Judicial Notice extends not only to judges, but to juries with respect to matters falling within the sphere of their everyday

knowledge and experience. Thus the latter, as well as the former, may be asked to notice, without proof, the meaning of the imputation "Frozen Snake," in a libel action (*Hoare v. Silverlock*, 12 Q. B. 633). On the other hand, neither judges nor juries may act on their *private knowledge* of the case, but should, if they have material facts to impart, be sworn as witnesses. When so sworn, a judge, unlike a juryman, must not, whether acting alone or with others, adjudicate on his own testimony (*R. v. Antrim*, 2 I. R. pp. 141, 164; *Mitchell v. Croden*, 30 T. L. R. 526).

Matters directed by statute to be noticed, or which have been noticed by well-established practice or precedent, *must* be recognized; but beyond this, judges have a wide discretion and *may* notice much which they cannot be required to notice. The notice is in some cases *conclusive*, and in others (*e.g.*, the genuineness of signatures) merely *prima facie* and rebuttable.

When in doubt, the judge may *refresh his memory* by referring for information to appropriate sources, *e.g.*, to public histories, almanacs, dictionaries, or the officials of a public department (*post*, 115).

(1) **Law, Procedure, Custom.**—Judicial notice will be taken of all Public Statutes, and of all Acts of Parliament of whatever nature passed since 1850, unless the contrary is expressly provided (52 & 53 Vict. c. 63, s. 9); as well as of every branch of unwritten law. Thus if, in a common law Court, points of ecclesiastical or admiralty law arise, they must be determined not by calling experts, but by the Court itself, either of its own knowledge, or by inquiry, or by hearing authorities and argument (*Sims v. Marryat*, 17 Q. B. pp. 288, 292). On the other hand, *foreign law* is not noticed, but must, as we have seen, be proved as a fact to the judge by skilled witnesses (*ante*, 6).

Judicial notice will be taken of the procedure of the Houses of Parliament, and of the High Court (though not of inferior Courts, unless regulated by Statute), as well as of all customs which have either been *settled by judicial decision*, or *certified to the High Court* (*post*, 112).

(2) **Constitutional, Political, and Administrative Matters.**—Notice will be taken of the accession and demise of the Sovereigns of this country; of the existence and titles of all other recognized Sovereign Powers; of the principal officers of State and heads of departments, past or present (*Whaley v. Carlisle*, 17 Ir. C. L. R. 792); and of the judges of the Supreme Court. Notice will also be taken of wars in which this country is, or has been, engaged; and generally of all public matters affecting the government of the country.

(3) **Territorial and Geographical Divisions.**—Notice will be taken of the extent of British jurisdiction; but if this is in doubt the Court should either apply under the Foreign Jurisdiction Act, 1890, s. 4, to one of H.M.'s Secretaries of State, whose report will be "conclusive evidence" of the matters stated (*Foster v. Globe Syndicate*, 1900, 1 Ch. 811), or, if this has not been done, hear evidence on the point (*Ibrahim v. Rex*, 1914, A. C. 599). The territorial and administrative divisions of the country into counties, towns, parishes, &c., will also be noticed, but not the situation or boundaries of particular places.

(4) **The Official Gazettes** of London, Edinburgh, and Dublin will be noticed on their mere production (31 & 32 Vict. c. 37, ss. 2 and 5; *post*, 106).

(5) **Official Seals and Signatures.**—Notice will be taken of the various royal and duchy seals; the seals of the superior courts, central office, and district registries (Jud. Act, 1873, s. 61); the signatures of the judges of the superior courts to official documents; and those of the various officials authorized by the Commissioners for Oaths Acts, 1889 and 1891, to administer oaths in any place out of England.

(6) **Notorious Facts.**—The Courts will notice facts which are notorious—*e.g.*, the ordinary course of nature; the standards of weight and measure; the public coin and currency; and the meaning of common words and phrases. They have also taken notice that the streets of London are crowded and dangerous, and that boys are naturally reckless.

CHAPTER III.

BURDEN OF PROOF. THE "BEST-EVIDENCE" RULE.

[30-48.]

BURDEN OF PROOF.—The general rule is, that he who asserts must prove, whether the allegation be an affirmative or negative one, and not he who denies.

As applied to judicial proceedings, however, the phrase, "burden of proof," has two distinct and frequently confused meanings: the burden of proof as a matter of law and pleading—the burden, as it has been called, of *establishing a case*, whether by preponderance of evidence, or beyond a reasonable doubt; and the burden of proof in the sense of *introducing evidence*.

(1) *Burden of proof on the pleadings.*—The burden of proof, in the former sense, rests upon the party, (plaintiff, prosecutor, or defendant), who in substance asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting under any circumstances whatever. If, when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him.

(2) *Burden of adducing Evidence.*—It is in the second sense that the term is more generally used, and must be understood in applying the following rules. This burden may shift constantly, according as one scale of evidence or the other preponderates.

The *onus probandi* in this sense rests upon the party who would fail if *no evidence at all, or no more evidence, as the case may be*, were given on either side; i.e., it rests, *before* evidence is gone into, upon the party asserting the affirmative of the issue; and it rests,

after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced.

EXCEPTIONS.—There are two cases in which the burden of proof (in the sense of adducing evidence) does not rest upon the party substantially asserting the affirmative; or which, if they arise during the trial, will operate to shift such burden to his opponent.

(1) **When there exists a disputable presumption of law, or a prima facie case, in favour of a party,** it lies upon his adversary to rebut it.

Thus, a party suing on a bill of exchange need not allege, nor at the outset prove, consideration; nor when suing upon any contract, the defendant's *full age* or *sanity*, for the presumption is *prima facie* in favour of such conditions. So though a party asserting another's *death* must prove it, yet, if he give evidence that such person has not been heard of for seven years, by those most likely to have heard, the burden of disproof is shifted to his adversary, for the law presumes death in such a case (*post*, 204). So, the *legitimacy* of a child born during wedlock is presumed; but if its parents are shown to have been judicially separated more than nine months before its birth, the presumption is reversed (*post*, 204). Conflicting presumptions neutralize each other, and the case must then be decided solely on the evidence adduced (*R. v. Willshire*, 6 Q. B. D. 366).

The burden of proof, however, may be shifted not only by rebuttable presumptions of law, but by presumptions of fact of the stronger kind, or by any species of evidence sufficient to raise a *prima facie* case.

(2) **Where the subject-matter of a party's allegation (whether affirmative or negative) is peculiarly within the knowledge of his opponent,** it lies upon the latter to rebut such allegation.

The principle of this exception has been recognized chiefly in the older cases and by the Legislature. Thus, the burden of proving authority, consent, qualification, lawful excuse, and similar defences in criminal cases,

has in many instances been cast by statute upon the defendant as lying peculiarly within his knowledge. So the Summary Jurisdiction Act, 1879, s. 39, dispenses with disproof by informants, or complainants, of "any exemption, exception, proviso, excuse or qualification" which would be in favour of the defendant.

In the absence of statutory provision, however, the better opinion seems to be that *some primâ facie* evidence must generally be given by the plaintiff or prosecutor in order to cast the burden of disproof on the other side. It has frequently been held that the difficulty of proving a fact peculiarly known to an opponent, may affect the *quantum* of evidence demanded in the first instance, but does not necessarily shift the entire burden of proof.

THE BEST-EVIDENCE RULE. STRICT PROOF.

—The maxim that "*the best evidence must be given of which the nature of the case permits,*" has often been regarded as the one great cardinal principle underlying the law of evidence.

The maxim first appeared in the year 1700;* and for more than a century largely regulated the subject. Thus, circumstantial evidence used to be excluded if direct could be obtained, as also extrinsic proof of handwriting or consent, if the party's own testimony were available. About the beginning of the 19th century, however, a reaction set in; and perhaps the most conspicuous feature of the modern law has been its persistent recession from this once famous principle.

It is not now true that the best evidence *must*, or even *may* (*post*, 164, 168), always be given; though its non-production may afford matter for comment. Thus, circumstantial evidence is now as admissible as direct. Words spoken may be proved by third persons, though the speaker is in court and might be called. So, of handwriting: it is not necessary to call either the writer, or some one who saw the document written; the opinion of a witness who but once, and many years before, has seen the party sign, is equally admissible, though its weight may be slight. Even on an indictment for forgery, the prosecutor is no longer an

essential witness to disprove either the handwriting or his authority to sign (*R. v. Hurley*, 2 M. & Rob. 473).

On the other hand, strict proof is required of *marriage* in cases of bigamy or divorce (*post*, 116); of *age* on a plea of infancy; generally of *the contents of private documents* by their production, though this rule, founded on the old doctrine of *profert*, long ante-dated the present maxim (*post*, chap. XXVI.); and of a few other matters.

BOOK II.
ADMISSIBILITY OF EVIDENCE.

PART I.—FACTS.

CHAPTER IV.

FACTS IN ISSUE. RELEVANCY. ADMISSIBILITY.

[49-54.]

THE facts which may be proved in a judicial inquiry are *facts in issue*; *facts relevant to the issue*; in exceptional cases *hearsay*, *opinions*, and *judgments* as to such facts; and any facts, whether relevant to the issue or not, which affect the legal reception or weight of the evidence tendered.

FACTS IN ISSUE are those facts which are necessary by law to establish the claim, liability, or defence, forming the subject-matter of the proceedings; and which, either by the pleadings or by implication, are in dispute between the parties. Facts in issue are, therefore, determinable primarily by the substantive law, and secondly by the pleadings.

FACTS RELEVANT TO THE ISSUE are facts which tend, either directly or indirectly, to prove or disprove a fact in issue, or some relevant fact. Facts relevant to the issue are determined by ordinary logic and experience.

Relevancy and Admissibility.—Although, however, legal admissibility is for the most part based upon logical relevancy, or that connection between events which, in the ordinary course of experience, is found to

render one probable from the existence of the other, the two theories do not wholly coincide. Thus, certain classes of facts (*e.g.*, similar occurrences and the character of the parties) which in ordinary life are relied upon as rendering other facts probable, the law (with certain exceptions) rejects, on grounds of policy or precedent, *e.g.*, as being too slight in probative force to form the basis of judicial decisions, or as confusing the jury by a multiplicity of issues, or as infringing some safeguard of public policy or personal privilege. On the other hand, numerous facts (*e.g.*, that a witness was not sworn in a particular way, or that, at the date of the trial, a hearsay declarant was dead, a document was thirty years old, or, if lost, was duly searched for) are legally admissible though they may have no logical bearing on the issue. It is not correct, therefore, to say, as is sometimes done (*e.g.*, Thayer, *Pr. Tr. Ev.* 266; Wigmore, *Ev.* s. 9; Wills, *Ev.* 2nd ed. 58), that "without any exception, nothing that is not logically relevant is admissible." Indeed, Sir J. Stephen amended his original definition of relevancy to mark this very distinction by the use of the terms "relevant" and "deemed to be relevant," respectively (art. 2; *cp.* Best, s. 34). These terms, however, are apt to mislead, as they seem to imply that legal logic is something different from lay logic, and that the Court may regard facts as *logically* probative or the reverse, when they are not really so, whereas all the author means is that the Court may admit or reject facts irrespective of their logical relevancy. It is safer, therefore, to use the term "relevant" as meaning logically probative, and "admissible" as meaning legally receivable, whether logically probative or not.

Moreover, there are three important classes of facts dealt with by the law of evidence—viz. Hearsay, Opinions, and Judgments, which are of a two-fold nature, and as to which it is necessary to consider not merely the relevancy of the fact asserted, but also the accuracy or other quality of the assertion made, which is a matter determinable by rules other than those of relevancy (*post*, 60, 116, 125).

CHAPTER V.

THE FACT OR TRANSACTION IN ISSUE. RES GESTA.

[55-87.]

Acts, declarations, and incidents which *constitute*, or *accompany and explain*, the fact or transaction in issue, are admissible, for or against either party, as forming parts of the *res gesta*.

Principle.—The ground of admission is that such facts and declarations form parts of the act itself, *pars rei gestæ*, or are so intimately connected therewith, that they may be considered as doing so. The plural form, *res gestæ*, though conveying the evidential idea less correctly, is also frequently used.

CONSTITUENT FACTS.—The fact or transaction in issue is not always admissible in evidence in the sense of being the subject of direct assertion or denial, for it may involve inferences of law or fact which it is for the Court or jury, and not for the witnesses, to draw.

Where the main fact is of a simple nature, *e.g.*, the mere utterance of slanderous words, or the identity of a person or thing, this objection does not apply. But wherever the inference is doubtful, the proper course is for the witness to state the incidents relied on as constituting or amounting to the main fact, and not the latter *per se*. Thus, in a breach of promise action, the plaintiff may not testify that the defendant *promised* to marry her, but should state what he wrote or said. So, on a question of infringement, experts, though they may give their opinion on the points of science involved, may not testify that there has, or has not, been an *infringement* (*post*, 118-20).

Sometimes the main transaction can only be established by proving a series of *similar facts*, which may happen either because the nature of the case itself demands cumulative instances (*e.g.*, *custom, trading, frequenting*), or because the similar facts have occurred in such close connection in point of time, place, etc., that they virtually form one continuous transaction.

ACCOMPANYING FACTS.—There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany, and tend to explain, the main fact. In testifying to the matters in issue, therefore, witnesses are required to state them, not in their barest possible form, but with a reasonable fullness of detail and circumstance.

Declarations accompanying Acts (a).—Questions of evidence in this connection usually arise with regard to statements, since with other incidents there is less danger of being misled. The following points should be noted:

(1) The declarations must be substantially *contemporaneous* with the act, *i.e.*, made either during, or immediately before or after, its occurrence—but not at such an interval as to allow of fabrication, or to reduce them to the mere narrative of a past event.

(2) The act itself must be *in issue*, or *relevant*; and the declarations can only be used to explain the fact they accompany, and not prior or subsequent disconnected facts.

(3) The declarations are no proof of the fact they accompany; this must be established independently. And though admissible to *explain* or *corroborate*, they are not, in general, evidence of the *truth* of the matters stated, *i.e.*, they are original evidence, not exceptions to the hearsay rule (*ante*, 2; *post*, 60).

Mental and Physical Conditions (b).—*Direct Testimony.* Witnesses may speak directly as to their *own* feelings, motives, or intentions, at a given time, their testimony being based not on inference, but consciousness. They may not, in general, however, testify to the state of mind of *others*, as to which they can have

no direct knowledge, but must detail the facts from which the given condition may be inferred. *Declarations out of Court*.—Thus, when the *bodily or mental feelings* of a person are material to be proved, the usual expression of such feelings made at the time may be given in evidence; though not statements as to their *cause*, nor as to *past* conditions. In proving *intention*, also, a stricter rule prevails in criminal than in civil cases; bare declarations, unconnected with an act, being generally excluded (except against the declarant himself) in the former, although admitted in many cases in the latter. Such declarations are sometimes considered to fall within the *res gesta* principle, and sometimes to form a special category of their own. In either view, they are admitted merely as *conduct* from which the existence of the given condition may be inferred, and not as *assertions* establishing the truth of the facts asserted (*Lloyd v. Powell &c. Co.*, 1914, A. C. 740-1, 751-2).

EXAMPLES.

Admissible.

(a) The question being which of two vessels was to blame for a collision;—the fact that the pilot of one of the vessels, after she was cut away and while she was backing, exclaimed, stamping his foot, "The d——d helm is still a-starboard," is admissible as part of the *res gesta*, although it would not be receivable against the owners as an admission by their agent (*The Schwalbe*, Swab. 521).

So, an exclamation by a bystander in a running down case, of "Shame!" if made at the time, is receivable (*Milne v. Leisler*, *infra*, per Pollock, C.B.).

The question being whether A. sold goods to B. personally, or to B. as C.'s agent, the sale being made subject to inquiry from D., B.'s reference;—a letter written by A. to his own agent, asking him to "enquire from D. as to the credit of C. and also of B.,

Inadmissible.

(a) The question being whether a collision, by which the plaintiff was injured, was due to the negligence of the defendants, a tram-car company;—a remark made by a fellow-passenger of the plaintiff's to the conductor, a few moments after the collision, that "the driver ought to be reported," and the conductor's reply, that "he has already been reported, for he has been off the line five or six times to-day—he is a new driver," held inadmissible (1) the transaction being over, and (2) the remark referring, not to the *res*, but to the past acts of the driver (*Agassiz v. London Tram. Co.*, 21 W. R. 199).

The question being as to the terms upon which A., the country agent of B., bought goods from C.;—a letter written immediately after the sale by A. (deceased) to B., stating the

Admissible.

who is making large purchases for C.," is admissible for A. as part of the transaction in corroboration of other evidence, though no proof *per se* that B.'s purchase was for C. [*Milne v. Leisler*, 7 H. & N. 786; here the action was by A. against a third party to whom B. had pledged the goods].

A., the drawer of a bill purporting to be accepted by C., sues B., the indorsee, for falsely imprisoning A. on a charge of forging C.'s acceptance;—evidence that C., who was not called as a witness, had refused to pay the bill, stating that his name had been forged by A., held admissible as part of the *res gesta* to show B.'s good faith, in mitigation of damages, but not to prove the forgery (*Perkins v. Vaughan*, 4 M. & G. 988).

A. is charged with the manslaughter of B., by driving over him. A statement by B., immediately after the occurrence, that he had been knocked down by A.'s cabriolet,—held admissible to prove that fact [*R. v. Foster*, 6 C. & P. 325. Declarations as to the *cause* of an injury have been considered to form an exception to the general rule that declarations of the present class are no evidence of the *truth* of the facts stated; *ante*, 17].

(b) A. is charged with causing B.'s death by poison;—the fact that shortly before the alleged administration of poison B. appeared to be, and expressed himself as being, in good health, and subsequently to it exhibited symptoms and made statements expressive of suffering, are admissible (*R. v. Johnson*, 2 C. & K. 354). And where A. was charged with an illegal opera-

Inadmissible.

terms and enclosing C.'s invoice and draft for acceptance by B., held not admissible as part of the *res gesta* (*Smith v. Blakey*, L. R. 2 Q. B. 326; *post*, 85, 89).

A. sues B. for infringement of a patent granted in 1849, B.'s defence being want of novelty. B. having proved that C. (deceased) had in 1846 sold articles similar to those patented, A., in reply, calls D. to prove that in 1850, C., when selling D. one of such articles, said, "This is a new article which I don't want publicly known." Held that C.'s statement was inadmissible (1) to explain or disprove the sales in 1846; and also (2) because the sale in 1850, which it did accompany and explain, was itself irrelevant, being subsequent to A.'s patent (*Hyde v. Palmer*, 32 L. J. Q. B. 126).

A. is charged with the murder of B. An exclamation by B., while rushing, with her throat cut, out of a house B. had been seen to enter a minute or two before, of, "Oh, aunt, see what A. has done to me!" held inadmissible, the transaction being over [*R. v. Bedingfield*, 14 Cox 341. This case, in which the rule is sometimes thought to have been applied too strictly, was approved in *R. v. Christie*, 1914, A. C. 545; *post*, 75].

(b) A. is charged with causing B.'s death by an illegal operation;—statements by B., made during her illness, that A. had operated upon her, and that her illness was caused thereby, are inadmissible (*R. v. Gloster*, 16 Cox 471; *post*, 99); as also her statements as to what her symptoms had been some days *prior* to such statements (*ibid.*). So, in a compensation case, a

Admissible.

tion on B. (deceased), a reply by B. to her doctor that "A. had massaged her" was admitted as a guide for her treatment (*R. v. Pratt*, 56 L. Jo. 73, *per Lush, J., sed qu.*).

In an action on a policy on the life of A. (deceased), to which the defence was that A. had insured not for his own benefit, but for that of B., his son (also deceased), declarations by A. that he intended to insure for his own benefit, and by B. that he, B., intended to insure A.'s life for his, B.'s, benefit in case of A.'s death;—Held admissible for plaintiff and defendant respectively (*Shilling v. Accidental Death Co.*, 1 F. & F. 116; *Newman v. Belsten*, 76 L. T. Jo. 228, *affd.* 28 Sol. Jo. 301, C. A.).

A., on behalf of B., her illegitimate child by C., sues C.'s employer for damages for C.'s death. Declarations by C. acknowledging B.'s paternity, and expressing his intention to marry A. and support B.;—Held admissible as conduct to prove B.'s paternity (*Lloyd v. Powell &c. Co.*, 1914, A. C. 733).

As to declarations of intent to commit suicide, see *post*, 37.

To show that A., when making a certain payment, *knew* that he was insolvent; statements by him at the time, and letters received by him in which the writers refused him pecuniary help, are admissible, though the letters are no evidence of the truth of their contents (*Vacher v. Cocks*, *post*, 41).

Inadmissible.

declaration by a deceased workman, on his return home, that his symptoms were caused by an accident while at work (*Gilbey v. G. W. Ry.*, 102 L. T. 202, C. A.; *Amyes v. Barton*, 1911, 1 K. B. 40, C. A.).

A. lodges securities at a bank in the names of himself and his daughter. In a memo. fifteen months later (found after his death) he directs the securities to be applied to other purposes. Held, the memo. was not admissible to show his intent on the prior occasion (*O'Brien v. Sheil*, *post*, 206; *cp. Peacock v. Harris*, 5 A. & E. 449, and *Re Gooch*, 62 L. T. p. 387).

A., a priest, is charged with blasphemously burning Bibles. Sermons preached by him some days before, on occasions not connected with the burning, are not admissible to show that he intended only immoral books to be burnt (*R. v. Petcherini*, 7 Cox 79; *R. v. Cantwell*, 120 C. C. C. Sess. Pap. 939).

As to declarations by the injured party of intent to perform an illegal operation, or to meet the prisoner, see *post*, 37.

A. is charged with bigamy. To prove that B., his first wife, *knew*, at the time of their marriage, that she had been falsely described in the banns,—a statement made by B., *after* the marriage, that she *knew* this *before* it, is inadmissible (*R. v. Kay*, 16 Cox 292).

CHAPTER VI.

AGENCY. PARTNERSHIP. COMPANY. CONSPIRACY.
CO-TRESPASS, ETC.

[88-102.]

WHENEVER a party to the proceedings is, by the substantive law, rendered liable, civilly or criminally, for the acts, contracts, or representations of third persons, and such facts are material, they may be given in evidence, for or against him, as if they were his own.

Principle.—The last chapter dealt with the proof that may be given of the main transaction; the present deals with the various persons who may be concerned therein. The rule above stated, which is one rather of substantive law than of evidence, is based on the *identity of interest* subsisting between the party in question and the various persons enumerated.

The particular relationship rendering such evidence receivable must in all cases be proved *aliunde* to the satisfaction of the judge, and cannot, except as against themselves, be established by the declarations of such third persons made out of Court.

Contracts and representations by agents, etc., which are original evidence, must be distinguished from their mere hearsay *admissions*, which are only receivable against, but not in favour of, the principal (*post*, pp. 69-72).

AGENCY (a).—In *civil cases* the acts, contracts, and representations of the agent bind the principal when they have been expressly or impliedly authorized, or subsequently ratified, by him. And there is implied

authority in the agent to conduct the principal's business in the usual way—what is necessary for this purpose being determined by the nature of the business, and the practice of those engaged in it; evidence on both these points is therefore admissible (*Re Cunningham*, 36 Ch. D. 532). Save by statute, however, a party is not, in general, *criminally* responsible for the acts or knowledge of others, unless such acts have been directed or assented to by him, *i.e.*, unless a *mens rea* is clearly shown.

PARTNERSHIP.—A similar rule holds in cases of partnership, each partner being constituted the agent of the others for all purposes within the scope of the joint concern. Hence, after proof *aliunde* of association, the acts, contracts, and representations of each partner which have been expressly authorized, or are impliedly so (*i.e.*, necessary for carrying on the partnership business in the usual way), or which have been subsequently ratified, are admissible against the firm (Partnership Act, 1890, ss. 5-8). So, as to *Notice* (*ibid.* s. 16).

The declarations of a partner are not, however, except as against himself, admissible to prove the existence of the partnership; nor, probably, the nature and extent of the partnership business; nor the extent of his own authority to bind the firm. These must be established independently.

COMPANIES.—A company is liable for the acts, contracts, and representations of its directors, or other lawful agents, which are within the scope of their authority; though not for acts which are *ultra vires*, or were done *before* its formation.

CONSPIRACY (*b*).—On charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the *existence* of the conspiracy, or the *participation* of the defendants be proved first, though either element is nugatory without the other.

The evidence is admissible, although the acts and declarations proceeded from conspirators not included

in the indictment, or were done or made in the absence of the party against whom they are offered, or without his knowledge, or even before he joined the combination. But acts and declarations by others, not in furtherance of the common purpose (*c.g.*, mere admissions as to past events), or done or made after his connection with the conspiracy has ceased, are not admissible against a conspirator.

CO-TRESPASS, ETC.—The acts and declarations of co-trespassers, and indeed of all persons combined for a common object, whether civil or criminal, are also governed by the last-mentioned rules (*Pilot v. Craze*, 52 J. P. 311).

EXAMPLES.

Admissible.

(a) A., a horse-dealer, instructs B., his servant, to sell a horse without a warranty; B. sells the horse with a warranty. The sale and warranty bind A., as being within the usual course of a horse-dealer's business (*Howard v. Sheward*, L. R. 2 C. P. 148).

(b) A. and B. conspire to assault C. with their fists. In the struggle C. is killed by a blow from B. A. and B. are each criminally responsible for C.'s death (*R. v. Caton*, 12 Cox 624).

A. and B., employees at the Custom House, are charged with conspiring to pass goods through the Custom House without paying full duty.—False entries made in the books for the purpose of carrying out the fraud by A. are admissible against B. (*R. v. Blake*, 6 Q. B. 126).

Inadmissible.

(a) A., a private owner, instructs B., his servant, to sell a horse without a warranty to a private purchaser; B. sells the horse with a warranty. The sale, but not the warranty, binds A., as B. had no express or implied authority to give the latter (*Brady v. Todd*, 9 C. B. N. S. 592; *aliter*, perhaps, if the horse were sold at a public fair or mart).

(b) A. and B. conspire to assault C. with their fists. In the struggle B. catches up a deadly weapon and kills C.—A. is not responsible for B.'s act, as it was not done in furtherance of the common design (*R. v. Caton*, *opposite*).

A. and B., employees at the Custom House, are charged with conspiring to pass goods through the Custom House without paying full duty.—An entry made by A. on the counterfoil of his own cheque-book showing how he had shared the proceeds of the transaction with B. is not admissible against the latter, not being in furtherance of the common fraud (*R. v. Blake*, *opposite*).

Admissible.

A. and B. are indicted for conspiracy. A letter written by A. to B., but never received by B., in which A. described the proceedings which had already been taken as an encouragement to B. to proceed in the concern, is admissible against B. as an act done in furtherance of the common plot (*R. v. Hardy*, 24 How St. Tr. 473-477).

Inadmissible.

A. and B. are indicted for conspiracy. A letter written by A. to C. (not a member of the conspiracy) describing the proceedings already taken, and enclosing songs composed by A. and sung during them, is not admissible against B., not being a transaction in support of the conspiracy (*R. v. Hardy*, 24 How. St. Tr. 451-453).

CHAPTER VII.

FACTS RELEVANT TO PROVE THE MAIN FACT.

[103-135.]

FACTS LOGICALLY PROBATIVE (*a*).—Facts which are logically probative of the main fact, *e.g.*, which are only or chiefly consistent with its existence, may, in general, be given in evidence in proof thereof; and in disproof, those which are inconsistent, or show it to have been impossible. But facts which, though not wholly irrelevant, tend merely to confuse the jury by a *multiplicity of issues*, or to *create prejudice*, or *waste time* may, and generally will, be rejected.

Relevant Statements.—The statements dealt with in the present chapter are, like those in Chaps. V., VI., and IX., receivable purely as original evidence, and not as proving the *truth* of the facts asserted. They must, to be admissible, comply not only with the requirement of relevancy, but with the further conditions, if any, of the respective heads under which they are tendered, *e.g.*, as ancient documents, complaints, &c. (*post*, 27-9).

PREVIOUS AND SUBSEQUENT EXISTENCE OF FACTS (*b*).—States of persons, mind, or things, at a given time, may often be proved by showing their previous, or even subsequent existence, in the same state; there being a probability that certain conditions and relationships continue—*e.g.*, human life, marriage, sanity, opinions, title, partnership, official character, domicile.

This *presumption of continuance*, which is one of fact and not of law, will, however, weaken with remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case.

COURSE OF BUSINESS (c).—To prove that an act has been done, it is admissible to prove any *general* course of business or office, whether public or private, according to which it would ordinarily have been done; there being a probability that the general course will be followed in the particular case.

CUSTOM TO ANNEX INCIDENTS TO CONTRACTS, ETC. (d).—Proof of usage is admissible to annex unexpressed incidents (not inconsistent with those which are expressed) to oral or written contracts, grants, or wills; it being presumed that a party dealing in a particular market or place intends to adopt its established usages. If such usages be sufficiently general and notorious, they will even bind parties contracting in ignorance of them.

The party against whom the evidence is tendered may, on his side, show that the usage does not exist, or was expressly excluded, or is unreasonable, or illegal.

Custom or usage may be proved either by the direct evidence of witnesses, or by a series of particular instances in which it has been acted upon. When, however, a custom has been frequently proved (which may be shown by reported cases), it will be judicially noticed without evidence (*ante*, 8).—Usage is also admissible as affording a standard of comparison (*infra*); or to rebut fraud (*post*, 40); or to explain technical terms (*post*, 194, 200).

STANDARDS OF COMPARISON (e). **Conduct.**—On questions involving *Negligence* and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, or even the general practice of the community on the subject, are admissible as affording a standard by which the conduct in question may be gauged. As to the standard for *Drugs*, see *post*, 115.

Handwriting.—So, when a party's handwriting is in question, whether in civil or criminal proceedings, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the

same, may be submitted to the Court and jury as evidence of the genuineness or otherwise, of the writing in dispute " (28 & 29 Vict. c. 18, s. 8). The documents used for comparison need not be relevant for any *other* purpose; and the party himself may be required to write in the judge's presence for this purpose.

ACTING IN A CAPACITY (f).—In some cases, acting in a capacity or relationship may afford *prima facie* evidence of title to it, even in favour of the party so acting, the presumptions as to the regularity of acts, and against misconduct and bad faith, applying (*cp. post*, 205).

Thus, acting in a *public* (but not generally in a *private*) office is admissible, although the appointment itself is required to be by deed (*Dexter v. Hayes*, 11 Ir. C. L. R. 106); trading as a *public company* is evidence of incorporation (*R. v. Langton*, 13 Cox 349); and cohabitation evidence of a valid *marriage*, its weight varying with the circumstances.

Similarly, *title to property* may frequently be inferred from *acts of ownership*—*e.g.*, possession, receipt of rents and profits, and the discharge of the burdens or repairs of the property; while, in rebuttal, proof is admissible, that these acts were disputed, or done in the absence of persons interested in disputing them. Acts of ownership are receivable not as *admissions*, for they may be tendered as evidence by the party exercising them, but as showing possession and thus proving title.

Ancient documents showing ancient Possession (g).—Similarly, ancient documents (*i.e.*, over *thirty years* old) by which any right of property purports to have been exercised (*e.g.*, leases, licences, and grants) are admissible, even in favour of the grantor or his successor, in proof of ancient possession.

The grounds of admission are twofold,—*necessity*, ancient possession being incapable of direct proof by witnesses; and the fact that such documents are themselves *acts of ownership*, real transactions between man and man, only intelligible upon the footing of title, or at least of a *bonâ fide* belief in title, since in the ordinary

course of things men do not execute such documents without acting upon them (*Malcolmson v. O'Dea*, 10 H. L. C. 593; *Bristow v. Cormican*, 3 App. Cas. 641, 668). They are not received, however, as proving the truth of the facts stated, *i.e.*, as exceptions to the hearsay rule, but merely as presumptive evidence of possession.

(1) The documents should purport to *constitute* the transactions which they effect; mere *prior directions* to do the acts, or *subsequent narratives* of them, being inadmissible (*ibid.*). Thus, though expired leases may be tendered to show ancient possession of the property demised, or reserved from the demise, recitals in such leases of other documents or facts will be rejected, except as admissions (*Bristow v. Cormican*, *supra*).

(2) Deeds of this nature must, to ensure genuineness, be, like other ancient documents, produced from *proper custody* (*post*, 160-1); and should, to be of any weight, be *corroborated* by proof within living memory of payments made, or enjoyment had, in pursuance of them. The absence of evidence of modern enjoyment, however, goes merely to weight and not to admissibility.

(3) Ancient documents, admissible as *acts of ownership*, may be tendered on questions either of public or private right; and must be distinguished from those ancient documents which are received as evidence of *reputation*, which latter may consist of bare assertions, or recitals, of the right, but are confined to questions of public and general interest (*post*, 89-90).

PARTIES' GOOD OR BAD FAITH (*h.*).—Facts showing the *bona fides* of a party's claim or defence are generally admissible in support of his own case; and facts showing its *mala fides* admissible against him to impeach it, although such good or bad faith is not in issue (*post*, 32, 39).

COMPLAINTS.—In cases of rape, indecent assault, and similar offences upon females (but in no others), the fact that the prosecutrix made a complaint, shortly after the outrage, of the matters charged against the prisoner, together with the *particulars* of the complaint, are admissible as evidence in chief for the prosecution, not

to prove the truth of the matters stated, but (1) to confirm her testimony and, (2) where consent is in issue, to disprove consent (*R. v. Osborne*, 1905, 1 K. B. 551; *R. v. Lillyman*, 1896, 2 Q. B. 167; in *Steph. art. 8*, complaints are said to be admissible in *all* criminal cases, but this is not sustainable).

The rule as to complaints is a survival of the ancient requirement that the woman should raise "hue and cry" as a preliminary to an appeal of rape, the appellee being allowed, in defence, to deny that it had been raised. Formerly, when rules of evidence were in their infancy, it was allowable to corroborate *all* witnesses by proving that they had made prior statement similar to their testimony in court, and so were consistent with themselves, but this rule no longer obtains (*post*, 156-7).

Scope.—Complaints are admissible although made in the absence of the prisoner; or at such an interval as not to form part of the *res gesta*; or even though the girl is so young that disproof of her consent is unnecessary (*R. v. Osborne*, *supra*). They must, however, have been voluntary and spontaneous; and made at the first opportunity which reasonably offered (*ibid.*).

ADMISSIONS BY CONDUCT (*i*).—A party's admissions by conduct as to material facts may generally be proved against him; and evidence to explain or rebut such admissions is receivable in his favour.

Principle.—Admissions by conduct are sometimes considered as exceptions to the hearsay rule, *i.e.*, as equivalent to oral statements, and so inadmissible except as against a party. Assertions or admissions by conduct are, however, by no means convertible, as regards admissibility, with those made orally, *e.g.*, acting in a capacity or relationship is receivable in a party's own favour (*ante*, 27), while his mere declaration that he was entitled to so act would not be (*post*, 62-3). Admissions by conduct are, in truth, properly original evidence, receivable either as constituting, wholly or in part, a fact in issue, as where A. makes an offer to B. and B. assents to it by his conduct; or as relevant facts from which some fact in issue may be

inferred, as the fabrication or suppression of evidence to show the identity of a criminal (*post*, 35). Moreover, the admissions by conduct of *third persons* are sometimes receivable, which, unlike those of *parties*, could not be said to fall under any exception to the hearsay rule. As to admissions by conduct with reference to statements made in a party's presence, or documents in his possession, etc., see *post*, 73.

TREATMENT (*k*).—Ordinarily, acts of treatment, either by parties or strangers, expressive merely of their opinion or belief as to facts, are not receivable.

Principle.—Parke, B., once remarked, "A fact relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such statement or opinion, not on oath, would in itself be inadmissible;" Vaughan, J., in the same case, also considered treatment to be merely opinion expressed in conduct instead of words, and so, even though against interest, inadmissible against third parties as suffering from the general infirmity of hearsay (*Wright v. Tatham*, 5 C. & F. pp. 738-9). This ground, however, has not been generally adopted, the hearsay rule being confined to *statements* and not extending to *conduct* (*post*, 60). Exclusion or admission, here, appears to be determined mainly by logical relevancy.

Exceptions.—Facts of the above class are sometimes received even in a party's own favour, *e.g.*, to show title, or good faith; and sometimes even in actions between strangers. Thus, on questions of *pedigree*, family conduct is admissible to prove relationship; and the treatment of friends and neighbours to prove *marriage* (*post*, 96, 116).

EXAMPLES.

Admissible.

(a) The question being whether A. is the child of B.;—evidence of the resemblance, or want of resemblance, of A. to B. is admissible (*Burnaby v. Baillie*, 42 Ch. D. 282; *A.-G. v. Slingsby*, 33 T. L. R. 120, H. L.).

Inadmissible.

(a) The question being whether the pupils at a certain school were badly fed and lodged:—the fact that they were badly educated is irrelevant (*Boldron v. Widdows*, 1 C. & P. 65).

Admissible.

(b) To prove the existence of a partnership in 1838, evidence is admissible that it existed in 1816 (*Clark v. Alexander*, 8 Scott. N. R. 161; *Brown v. Wren*, 1895, 1 Q. B. 390).

To prove that A. did not believe in a Supreme Being when taking a parliamentary oath;—evidence may be given that A. had no such belief four years before his election [*A.-G. v. Bradlaugh*, 14 Q. B. D., pp. 699, 711. Such evidence is also probably admissible for as well as against a party, *R. v. Hardy*, 24 How. St. 1093-1094].

(c) To prove the *posting* of a letter;—it is relevant to show that it was delivered to a clerk who, though he had no recollection of the particular letter, habitually took all letters delivered to him to the post (*Hetherington v. Kemp*, 4 Camp. 193; *Trotter v. Maclean*, 13 Ch. D. 574).

To prove that a certain indorsement had been made on a (lost) licence entered at the Custom House;—it is relevant to show that the course of office was, not to permit the entry without such indorsements (*Butler v. Allnutt*, 1 Stark, 222).

(d) A., a veterinary, sues B. for medicine and attendance, under an oral contract which only provided for the supply of medicine; evidence of a usage among veterinaries to charge for attendance as well as medicine is admissible (*Sewell v. Corp.*, 1 C. & P. 392).

The question being whether A., a broker, is personally liable on a written contract made by him for an undisclosed principal;—evidence may be given of a usage that brokers who do not

Inadmissible.

To prove that A. did not believe in a Supreme Being when taking a parliamentary oath;—evidence that he had no such belief thirty years before is inadmissible, for no reasonable inference could be drawn therefrom (*A.-G. v. Bradlaugh*, *opposite*).

(c) Where a statute provided that both a bill of sale and its accompanying affidavit should be filed;—a certificate stamped on the former that “a copy thereof was duly registered,” held no evidence that the affidavit also had been filed, since the Act did not provide that one could not be filed without the other (*Mason v. Wood*, 1 C. P. D. 63).

(d) A., a veterinary, sues B. on an oral contract for medicine and attendance;—evidence of a usage among veterinaries to charge for attendance “where not much medicine is required,” held inadmissible as too vague (*Sewell v. Corp.*, *opposite*).

The question being whether B., an undisclosed principal, is liable on a written contract made for him by A., a broker and contracting as such;—evidence of a custom that where brokers do

Admissible.

disclose the names of their principals are personally liable (*Pike v. Ongley*, 18 Q. B. D. 708).

(e) The question being whether the pupils at a certain school were properly treated;—evidence is admissible of the *general* treatment of boys at schools of the same class, as affording a criterion of what the treatment should have been at the school in question (*Boldron v. Widdows*, 1 C. & P. 65).

(f) A. is criminally charged with libelling the directors of a bank;—evidence by the prosecution that they acted as such is sufficient proof against A. that they were directors (*R. v. Boaler*, 67 L. T. 354).

(g) The question being whether a corporation is entitled to claim tolls;—an ancient table of such tolls kept by the town clerk of the corporation, by which the lessees of the tolls had always been guided in their collections, is admissible in favour of the corporation (*Brett v. Beales*, M. & M. 419).

(h) The question being whether A. (the owner) or B. (the contractor) is liable for work done to a house by C., on B.'s order;—evidence that A. paid B. for the work is admissible in A.'s favour as showing the *bona fides* of his defence, and that it was not a mere attempt to avoid payment (*Gerish v. Chartier*, 1 C. B. 13).

A. sues B. for libel in describing him as a swindler;—a report to the same effect made by the French police, upon which A. founded his statements, held admissible to show the *bona fides*

Inadmissible.

not disclose the names of their principals, the broker is solely liable and the principal is discharged, is inadmissible as contradicting the contract (*semble*, *Pike v. Ongley*, *opposite*).

(e) The question being whether the pupils at a certain school were properly treated;—evidence is not admissible of the comparative treatment of boys at any other *particular* school (*Boldron v. Widdows*, *opposite*).

(g) The question being whether a corporation is entitled to claim tolls;—ancient entries in the books of the corporation, ordering powers of attorney to be made out to its bailiffs authorizing them to receive the tolls, are not admissible (*Brett v. Beales*, *opposite*).

(h) The exors. of A. (a deceased stock-broker) sue B. for money lent her by A. Defence that the advance was a gift, not a loan. The fact that A. entered it in his books as a loan and debited B. with interest: Held, not admissible to show that A. had *bona fide* treated it as such. The entries, being in A.'s interest and not against it, were also rejected as statements by a deceased person (*post*, 83) [*Schwabacher v. Heimer*, Nov. 29, 1907, C. A. *Ex. rel.*]

Admissible.

of A.'s defence, though not to justify the libel, or prove its truth (*R. v. Labouchere*, 14 Cox 419).

(i) A. (a parishioner) pays a sum of money as tithes to B. (a rector). This is an admission by conduct against A. that B. is entitled to the tithes (*James v. Biou*, 2 Sim. & St. 606).

A sues B. for injuries caused by B.;—the fact that A. had ascribed her injuries to a fall and not to B. is relevant as impeaching her case; and evidence that she had had no such fall is admissible in rebuttal (*Melhuish v. Collier*, 15 Q. B. 878). So, the fact that A.'s husband and her solicitor's clerk had conspired to suborn false witnesses at the trial is relevant as an admission by conduct that A.'s claim is bad (*Moriarty v. L. C. & D. Ry.*, L. R. 5 Q. B. 314; *R. v. Watt*, 70 J. P. Rep. 29).

(k) The question being whether A., at the date of her marriage to B. in Oct. 1882, was insane,—the fact that she was everywhere received and treated as an ordinary person down to her engagement in Aug. 1882, was admitted (*Durham v. Durham*, 10 P. D. 80, 84, *per* Hannen, J.; *post*, 124).

Inadmissible.

(i) A. (a parishioner) pays a sum of money as tithes to B. (a rector). This is not an admission by conduct against B. that A. owes him the tithes (*James v. Biou*, *opposite*).

A. sues a railway company for injury by an accident. The fact that the company adopted additional precautions after the accident is not an admission by conduct of their previous negligence [*Hart v. L. & Y. Ry.*, 21 L. T. 261. Bramwell, B., remarked: "People do not furnish evidence against themselves simply by adopting a new plan to prevent the recurrence of an accident. Because the world gets wiser as it gets older, it was not therefore foolish before"].

(k) The question being whether A. was insane at the time of making his will,—letters found in his possession after his death, in which A. was treated as sane, but which were not connected with any act done by him in relation thereto; — Held inadmissible, though the writers (since deceased) had vouched for the genuineness of the opinions by sending the letters (*Wright v. Tatham*, 1838, 5 C. & F. 670). So, the fact that A.'s father had left him property about the date of A.'s will, and so believed and treated him as sane, was rejected (*Sutton v. Saddler*, 3 C. B. N. S. 99-100, *per* Cockburn, C.J.; *post*, 124).

CHAPTER VIII.

FACTS RELEVANT TO SHOW IDENTITY, OR CONNECT
THE PARTIES WITH THE TRANSACTION.

[136-144.]

Personal Characteristics.—When a party's identity with an ascertained person is in issue it may be proved or disproved not only by direct testimony, but presumptively by similarity or dissimilarity of characteristics, *e.g.*, age, appearance (*ante*, 30), handwriting (*ante*, 26), as well as by a comparison of address, occupation, and other details of personal history.

Where, however, a party's identity is only material as showing that he did some particular act, the range of facts is much narrower. In civil cases, a party's identity most frequently comes in question as having executed a particular document; and here identity of name and handwriting will generally suffice. As to proof by opinion evidence and photographs, see *post*, 121).

Previous and Subsequent Conduct.—When a criminal act has been proved, the following facts are relevant to connect the accused therewith:—

Previous Conduct and Capacity. Declarations and Threats.—The presence or absence of facts showing motive, means, and opportunity, preparation or previous attempts on his part to do the act; his knowledge of circumstances enabling him to do it; and his declarations of intention or threats uttered with the same view. When the doing of the act requires any special knowledge, skill, or capacity, the party's possession or non-possession thereof is also relevant.

Alibi.—So, the fact that he was in the neighbourhood, or elsewhere about the time of the act; or that footmarks or finger-prints corresponding to his own, or articles belonging to him, were found near the spot, are relevant.

Subsequent Conduct.—The presence or absence of facts showing his consciousness of having done the act may also be proved—*e.g.*, precautions taken to avert suspicion; change of demeanour or mode of life; flight; the fabrication or suppression of evidence; or the giving of false names, addresses, and explanations.

Possession of Property.—The possession of property connected with the transaction is generally a highly incriminatory fact. Thus, *recent* possession of stolen property, if not reasonably explained, raises a presumption of fact, though not of law, that the possessor is either the thief or the receiver, according to the circumstances.

Acts of Others.—On the other hand, it is relevant for the accused to show that the act was more likely to have been done by third persons, or by the injured party himself, and the prosecution may rebut such evidence. Neither the confessions (*post*, 79), nor the convictions or acquittals (*post*, 131-2), of third persons are, however, evidence for or against the accused for the present purpose. And although the doings of the injured party are relevant to show the cause of his injury, his mere declarations unconnected with the act have been rejected (*R. v. Thomson, post*, 37).

EXAMPLES.

Admissible.

A. is charged with the murder of B. The fact that shortly before the murder, B. had given evidence against A. on a charge of theft, and the depositions containing B.'s testimony, are relevant as showing A.'s motive (*R. v. Buckley*, 13 Cox 293; the depositions would not be evidence that B.'s statements were true, *post*, 132). The following facts are also relevant as showing A.'s identity;—the fact that he had declared he would be revenged on B.; that he had purchased weapons similar to those that caused B.'s death; that foot-prints similar to A.'s

Inadmissible.

A. is charged with the murder of B. The following facts are inadmissible;—that A. was of sinister appearance; of bad character (*post*, 49); had narrowly escaped conviction for a previous murder (*cp. post*, 43); had been heard to declare in his sleep that he had killed B. (*post*, 79); that great ill-feeling existed between A.'s nation and B.'s and that a year before one of the latter had been murdered by one of the former in the same manner and place (*post*, 43); that all A.'s neighbours believed him guilty (*post*, 116); that C., on his death-bed had confessed

Admissible.

were found near the spot; that he had also been seen in the same vicinity; that he absented himself after the murder and had given inconsistent accounts of his doings at the time [Best, ss. 91-92].

A. is charged with publishing libellous letters about B.;—Evidence that after A.'s arrest further libels in the same handwriting were published about B. is admissible as tending to exonerate A. (*R. v. Brownhill*, 8 Cr. App. R. 258).

The question being whether A. murdered B. by the explosion of grenades;—the fact that the grenades were ordered by C., and the contents of a letter from C. (indicating hostility to B.) found at A.'s lodgings after his arrest, and bearing a memorandum in A.'s handwriting, are admissible against A. [*R. v. Bernard*, 1 F. & F. 240; documents found in a party's possession, though admissible to show his knowledge or complicity, are not *per se* evidence of the truth of the statements therein, see *R. v. Plumer*, &c., *post*, 73, 75].

A. is charged with wounding a constable;—it is competent for A. to give in evidence facts showing that B. C. & D. were more likely to have committed the crime than he; and B. C. and D. may deny on oath the facts alleged (*R. v. Dytche*, 17 Cox 39; in this case B. C. & D. had been convicted and were suffering imprisonment for the crime).

A. is charged with the murder of B. Evidence that B., before her death had been melancholy

Inadmissible.

that he, and not A., had killed B. (*post*, 61, 99) [Best, ss. 91-92].

A. is charged with stealing and receiving the goods of B. on October 15. The fact that A. evaded arrest when charged with stealing and receiving the goods of C. on October 26, is inadmissible (*R. v. Hampson*, 11 Cr. App. R. 75, 77; *cp.*, *post*, 49).

The question being whether A. and B. had stolen certain shawls;—the fact that an inventory of the shawls, not in A.'s handwriting, but contained in an envelope on which he had written "A.—private," was found in a bag which A. said belonged to B., in a room in which they both lodged,—held inadmissible, as the indorsement might have been written prior to the enclosure (*R. v. Hare*, 3 Cox 247; *sed qu.*, and see 2 Russ. Cr. 2100 n.).

To prove that A. (residing in London) had fitted out a vessel to be employed in the slave-trade abroad;—slave trading papers found on board at one (not the first) of the foreign ports at which the vessel touched, but which papers were not otherwise traced to A.'s knowledge, held inadmissible, as the papers might have been introduced at some intermediate port without A.'s knowledge (*R. v. Zulueta*, 1 C. & K. 215).

A. is charged with procuring an abortion on B., deceased. Evidence that (1) a month

Admissible.

and depressed and had threatened to take her own life;—Held admissible (*R. v. Cowper*, 13 How. St. Tr. 1166-9; *R. v. Jessop*, 16 Cox 204, *per* Field, J.; *cp. ante*, 18, 20).

A. is charged with the murder of B., his wife. A statement by B. a week before the murder, on going to a neighbour and handing the latter an axe and a knife, of: "Please put these up . . . for A. always threatens me with them and when they are out of the way I feel safer";—Held admissible [*R. v. Edwards*, 12 Cox 230, *per* Quain, J. No reasons are given. The statement did not accompany the murder, and the deposit, which it did accompany, seems irrelevant. The threats, also, were *past* and not *present* ones. This case is doubted in *Tay. s. 584 n.*, and was cited but not followed in *R. v. Thomson, supra*].

Inadmissible.

before B. expressed an intention of operating on herself; and (2) after the operation, said she had done so;—Held, inadmissible (*R. v. Thomson*, 1912, 3 K. B. 19, C. C. R., by 3 judges; *cp. ante*, 18, 20).

A. is charged with the murder of B. A statement by B. when leaving her lodgings some hours previous to the crime that she was going to meet A.;—Held inadmissible [*R. v. Wainwright*, 13 Cox 171. Cockburn, C.J. observed, "It was no part of the act of leaving, but only an incidental remark that might, or might not have been carried out. She would have gone away in any circumstances." A similar statement was rejected by Bovill, C.J., in *R. v. Pook, id.* 172 *n.* These cases were apparently approved in *R. v. Christie*, 1914, A. C. 545, 547, and *R. v. Thomson, supra*. In Bankruptcy, however, statements by debtors, on leaving home, have generally been admitted in proof of their intent to defeat creditors].

CHAPTER IX.

FACTS RELEVANT TO PROVE STATES OF MIND.

[145-157.]

WHEN the state of mind of a party with reference to a transaction is material, all facts from which it may be inferred, whether previous or subsequent thereto, are, in general, admissible either for or against him. Declarations tendered for this purpose are, however, no evidence of the *truth* of the matters stated, and are subject to the limitations noticed *ante*, 18, 20, 37.

KNOWLEDGE AND NOTICE (*a*).—Actual knowledge may be inferred circumstantially from the fact that a party had reasonable means of knowledge—*e.g.*, *possession of documents* containing the information, especially if he has answered, or otherwise acted upon, them; or from the fact that such documents, or notices, properly addressed, have been delivered at, or posted to, his residence. So, *execution* of documents, though not mere *attestation*, will imply knowledge of their contents. And knowledge may also be imputed where it is a party's *duty to know* as distinguished from a mere right to inspect; as well as from the *notoriety* of the fact in his calling or vicinity; while mere *rumour* or *reputation* is inadmissible. *Access* to documents may also, sometimes, raise a presumption of knowledge—*e.g.*, in the case of the rules of a club, or books kept between partners, banker and customer, and the like; though this presumption does not extend to directors or shareholders as to the books of a company.

Constructive Notice is a presumption of knowledge which will not be allowed to be rebutted; and arises in equity, where a party has had the means of knowledge and might have obtained it, but for his own gross negligence, or wilful abstention. In such cases whatever is sufficient to put a person of ordinary prudence on inquiry is constructive notice of all to which that inquiry would lead. Thus, claiming under, or contracting with, a party who derives his title from an instrument is, in equity, constructive notice of its contents; so, notice of a deed or trust, is notice of its terms. At common law, however, and particularly in mercantile transactions, this presumption is more restricted; here, therefore, notice of a document is not necessarily notice of its terms.

INTENTION.—A party's intention, with reference to an act, may be proved, even in his own favour, not only by his direct testimony in Court, or his declarations out of Court (subject to the qualifications, *ante*, 18, 20, 37), but also circumstantially by acts and events prior or subsequent to the transaction; as well as, against himself, by his own admissions. As to *Similar Facts* to show intent, see *post*, 46-47.

GOOD AND BAD FAITH (*b*).—A party's good faith in doing an act may generally be inferred from any facts which would justify its doing. In such cases the information (whether true or false) on which he acted will often be material.

So, to show the *bona fides* of a party's belief, it is admissible to show the state of his knowledge, and that he had reasonable grounds for such belief (*Derry v. Peek*, 14 App. Cas. 337), *e.g.*, that it was shared by the community, or even by individuals similarly situated to himself; while the absence of reasonable grounds of belief in the existence of a fact, *e.g.*, means of knowing the opposite, is evidence of want of honest belief (*Derry v. Peek*, *supra*).

FRAUD.—When fraud is in issue, the particulars of it have generally to be pleaded, and the question of their sufficiency often becomes one of law. Fraud imports moral obliquity, a dishonest or wicked mind; but facts

may, of course, be evidence of fraud without being in law sufficient to constitute or establish it (*Derry v. Peek, supra*). Moreover, proof that they were customary may be tendered to rebut fraud (*King v. Spencer*, 20 Cox 692).

Concealment of Material Facts (*e.g.*, those affecting title or risk) by either party to a contract is evidence of fraud. A vendor, however, is not bound to disclose every defect in the property sold; nor *à fortiori* is a purchaser bound to disclose facts which would increase its value; and where there is no obligation to divulge, the *passive acquiescence* of either in the other's mistake is not evidence of fraud (*Smith v. Hughes*, L. R. 6 Q. B. 597). On the other hand, gross, but not slight, *inadequacy of price* may be.

Misrepresentation of Material Facts may of itself be perfectly innocent, but it becomes fraudulent if made (1) *knowingly*, or (2) *without belief in its truth*, or (3) *recklessly* without care whether true or false (*Derry v. Peek, supra*). In this connection, however, actions for rescission of contract must be distinguished from those for damages for deceit; a misrepresentation of material facts, though honestly made, being sufficient to sustain the former, while fraud in one of the three forms, *supra*, must be proved in the latter (*ibid.*).

MALICE.—The nature of malice varies in law with the proceedings in which it is in question. Thus it means one thing in relation to murder, another in relation to the Malicious Damage Act, 1861, and a third in relation to libel (*R. v. Tolson*, 23 Q. B. D. 168, 187). It has generally, however, to be inferred from the previous and subsequent conduct of the parties, or the terms upon which they have lived—*e.g.*, previous enmity, threats, quarrels, and violence; while in rebuttal previous expressions of good-will or acts of kindness may be shown.

EXAMPLES.

Admissible.

(a) The question being whether A., at the time of making a contract with B., knew that the latter was insane;—evidence of

Inadmissible.

(a) The question being whether A. knew, at a certain time, that B. was insane;—the fact that B. was generally reputed to be in-

Admissible.

B.'s conduct both before and after the transaction is admissible, as showing that his lunacy was of such a character as must have been apparent to A. (*Beaven v. McDonnell*, 10 Ex. 184).

The question being whether A., at the time of committing an act of bankruptcy, knew that he was insolvent—letters found in his possession after the act of bankruptcy, but bearing postmarks before it, and containing refusals to lend him money with which to pay his debts, are admissible to show his knowledge of the state of his affairs, though not the truth of the facts stated (*Vacher v. Cocks*, M. & M. 353).

(b) The question being whether A. and B., the vendors of a mine, acted in good faith in representing its value to C.;—favourable statements made to A. and B. by D., who sold them the mine, and conversations between A. and B. as to its condition, though not in C.'s presence, are admissible in favour of A. and B.; and books kept by their agent in the ordinary course of duty, at the mine, showing its inferior character, are admissible against them (*Shrewsbury v. Blount*, 2 M. & Gr. 475).

The question being whether A. acted in good faith in representing W., a tradesman, to be solvent, whereby B. trusted W., and suffered damage;—the fact that W. had sold goods to A. under cost price is admissible, as negating A.'s good faith; the fact that A.'s shopman, who was cognizant of the transactions between A. and W., believed W. to be solvent; and that other individual tradesmen

Inadmissible.

sane in the neighbourhood in which A. and B. lived at the time in question is inadmissible (*Greenstade v. Dare*, 20 Beav. 284).

For a case in which *subsequent* possession of documents was held not admissible to prove *former* knowledge of their contents, see *R. v. Zulueta*, ante, 36.

(b) In *Shrewsbury v. Blount*, *opposite*, books kept by the agent, but not in the regular course of duty and the entries in which might have been made afterwards, were held not admissible against A. and B.

Admissible.

in the same town who had dealt with W. also believed him to be solvent; and that there was a general reputation in the town that W. was solvent, are admissible in A.'s favour to show his good faith (*Sheen v. Bumpstead*, 2 H. & C. 193).

Inadmissible.

CHAPTER X.

SIMILAR FACTS.

[158-185.]

EXISTENCE OF MAIN FACT. CONNECTION OF PARTIES.—Facts which are relevant merely from their *general similarity* to the main fact, and not from some *specific connection* therewith, as shown below, are not admissible to prove its existence. Nor, to prove that a given party did an act, may evidence be tendered of similar acts done either by *himself*, to show a disposition, habit, or propensity to commit, and a consequent probability of his having committed, the act in question, or by *others*, though similarly circumstanced to himself, to show that he would be likely to act as they.

Principle of Exclusion.—Facts of this class, though often logically relevant, are rejected as legal evidence on grounds of convenience, since they tend to embarrass the inquiry with collateral issues, prejudice the parties with the jury, and encourage attacks without notice.

The maxim "*Res inter alios actæ alteri nocere non debent*" is sometimes supposed to express the principle of exclusion in such cases; but this is incorrect, for similar transactions *inter partes* would be equally inadmissible in this relation. Indeed, Mr. Taylor's view that this principle constitutes the most important test of irrelevancy (s. 317), is quite indefensible, since most of the facts relevant to prove the main fact, the identity of the parties, or their states of mind are *res inter alios*, while many that are irrelevant are *res inter partes* (see *ante*, 25-42). The rejection of evidence as *res inter alios acta* is now practically confined to the case of judgments and testimony in former trials (*post*, 131-132); though even where judgments, &c., are *inter*

partes, that element alone will not suffice to ensure their admission (*post*, 129, 132).

The admissibility of Similar Facts under the present head is mainly a question of degree, or of our knowledge, of the causes of events; and the similarity must be sufficiently strong to outweigh the practical dangers involved.

EXAMPLES.

GENERAL SIMILARITY.

Admissible.

Inadmissible.

The question being whether an obstruction to a harbour was caused by the crection of a sea-wall in its vicinity, evidence that similar obstructions occurred at *some* (but not *all*) other harbours on the same coast which were in the vicinity of sea-walls;—Held inadmissible (*Folkes v. Chadd*, 3 Doug. 157; *post*, 120).

The question being whether beer sold by A., a brewer, to B., a publican, was good, the fact that beer sold by A. to other publicans was good,—is inadmissible (*Holcombe v. Hewson*, 2 Camp. 391. *Aliter* if all the beer had been of the same brewing).

A. is charged with negligently performing a surgical operation. Evidence that in other similar cases A. had been negligent or skilful is inadmissible (*R. v. Whitehead*, 3 C. & K. 202; *Brown v. E. & M. Ry.* 22 Q. B. D. p. 393).

The question being whether A. had forged B.'s signature to a bill of exchange;—the fact that he had forged B.'s signature to other bills is not admissible. [*Viney v. Barss*, 1 Esp. 293. *Aliter* if all the bills belonged to the same collection: *Griffith v. Payne*, 11 A. & E. 131].

A., a tradesman, sues B. for goods sold. Defence that credit was given to C. (B.'s father-in-

Admissible.

Adultery.—A. petitions for divorce from B., his wife, on the ground of her adultery with C.;—evidence of (1) ante-nuptial incontinence by B. with C. (*Cantello v. Cantello*, Times, Feb. 1, 1896; *King v. King*, *ibid.*, Jan. 26, 1901); and (2) of post-nuptial acts both prior (*Harris v. Harris*, 27 L. T. 428; *Howard v. Howard*, Times, July 14, 1904) and subsequent (*Wales v. Wales*, 1900, P. 63) to those charged,—is relevant. See, also, as to charges of Incest (*R. v. Ball*, 1911, A. C. 47).

Agency.—The question being whether B., in fraudulently obtaining a certain premium from C., acted as agent to A., an insurance company;—the fact that B. obtained similar premiums from D., E. & F. to A.'s knowledge and for A.'s benefit, held admissible (*Blake v. Albion Society*, 4 C. P. D. 94; *R. v. Mean*, 69 J. P. Rep. 27).

Title.—To prove that a slip of waste land bordering a road belonged to the lord of the manor, and not to the owner of the adjacent land;—the fact that the lord owned other parts of the slip bordering the same road is admissible (*Doe v. Kemp*, 2 Bing. N. C. 102).

Inadmissible.

law);—evidence that other tradesmen had given credit to C. for goods supplied to B., is inadmissible (*Smith v. Wilkins*, 6 C. & P. 180). So, in a libel case, the fact that the defendant's informants were actuated by malice is not admissible to show that the defendant was so (*Hennessy v. Wright*, 24 Q. B. D. 447 n).

SPECIFIC CONNECTION.

Adultery.—A. petitions for divorce from B., her husband, on the ground *inter alia* of his adultery with C. Evidence that B., the respondent, had committed adultery with D. and was a man of habitually immoral habits, held inadmissible [*Pollard v. Pollard*, Times, March 26, 1904 *per* Jeune, P.; *contra*, perhaps, as to the general immoral character of C. (*Butchart v. B.*, Times, March 24, 1899, *per* the same Judge; *post*, 51)].

Agency.—A. sues B. on a bill of exchange, indorsed to A. in B.'s name by C. To disprove C.'s authority to indorse, B. tenders evidence that C. had on two previous occasions forged letters from B. to other persons stating that C. had B.'s authority to indorse bills. Held inadmissible (*Prescott v. Flinn*, 9 Bing. 19).

Title.—To prove that a slip of waste land bordering a road belonged to the lord of the manor, and not to the owner of the adjacent land;—acts of ownership by the lord over waste lands bordering other roads in the same manor, are inadmissible (*Doe v. Kemp*, *opposite*).

*Admissible.**Inadmissible.*

A. sues B. for work done to certain houses on the orders of C.;—it is admissible in order to prove that B. is the owner of the houses and the real principal, to show that other persons had (although unknown to A.) received orders from B. for work done to the *same* houses (*Woodward v. Buchanan*, L. R. 5 Q. B. 285. *Aliter* as to orders for work done at *other* houses).

Custom.—To prove that a certain custom prevailed in the cod-fisheries of Newfoundland;—the fact that the same custom prevailed in the cod-fisheries of Labrador is admissible (*Noble v. Kennoway*, 2 Doug. 510).

Animals.—To prove that A.'s dog killed a sheep belonging to B.;—the fact that the *same* dog had killed other sheep on different occasions belonging to other people is admissible (*Lewis v. Jones*, 49 J. P. 198).

Condition of Places.—A. sues a Dock Company for damages for the death of her husband in the dock;—evidence that other deaths had occurred at the same dock is admissible to show its dangerous character (*Moore v. Ransome*, 14 T. L. R. 539).

Animals.—To prove that A.'s dog had a propensity to bite human beings;—evidence that it had a propensity to bite animals is irrelevant (*Osborne v. Chocquel*, 1896, 2 Q. B. 109).

Condition of Places.—*Cf. Folkes v. Chadd*, ante, 44.

STATES OF MIND.—Similar facts, though generally inadmissible to prove the main fact, or the connection of the parties therewith, may, after proof of these points, be tendered to show the state of mind of the parties with reference to such fact. Thus, a party's *knowledge* that a representation was false, or that money passed was counterfeit, may be shown in this manner. And on charges of receiving, to show *scienter*, proof may be given (a) that other property, stolen within 12 months preceding the offence, was, or had been, in his possession; and, after seven days' notice and proof of

such possession (*b*) that he has, within five years preceding the offence, been convicted of fraud or dishonesty (Larceny Act, 1916, s. 43). So, a single similar act, proximate in time and method, and *à fortiori* a *system*, is admissible to rebut a defence of *accident*, *mistake*, or *innocent intent*.

EXAMPLES.

Admissible.

A. is charged with attempting to obtain money from B. by falsely pretending that a certain ring was a diamond ring;—evidence that A. had previously attempted to obtain money from other persons by false representations as to the genuineness of other rings and jewellery is admissible to show his knowledge that the ring in question was not genuine (*R. v. Francis*, L. R. 2 C. C. R. 128).

A., a doctor, is charged with using instruments on B. with intent to procure abortion;—evidence that nine months before (1) A. had performed a similar, though unsuccessful, operation on C., with the avowed intention of procuring her miscarriage; and (2) had then stated to C. that he was in the *habit* of performing *similar* operations for the same purpose;—held admissible to show intent and rebut the possible suggestion that the instruments were used for a lawful purpose (*R. v. Bond*, 1906, 2 K. B. 389).

A. is charged with the murder of B., an infant whom she had promised to adopt and maintain on receipt of a small premium from B.'s mother, but whose body was afterwards found buried in A.'s garden;—evidence that A. had received other infants from their mothers on similar terms, who had afterwards disappeared, and that the bodies of unidenti-

Inadmissible.

A. is charged with obtaining a pony and trap from B. by false pretences. Evidence that A. subsequently obtained different goods (*i.e.*, fodder) from C. by a different false pretence, is inadmissible (*R. v. Fisher*, 1910, 1 K. B. 149. Channell, J., remarked that swindling in a particular manner could not be shown by swindling in a different manner).

A. is charged with using a certain instrument on B. with intent to procure abortion. Evidence that four months later A. had treated another married woman in a similar manner,—held inadmissible, since two instances, especially where the second is a subsequent one, could not be relied on as proof of a systematic course of action (*R. v. Hicks*, 39 L. J. 421).

In *R. v. Bond*, *opposite*, Kennedy and Bray, JJ., thought that evidence of (1) without (2) would have been inadmissible; the L.C.J. and Ridley, J., though doubting whether (1) and (2) were, in the circumstances receivable, held that mere proof of a *single* similar act was not conclusive against admissibility; and Jelf, J., held that proof of *system* was unnecessary and that a single similar act merely affected weight, not admissibility. *Cp. Perkins v. Jeffrey*, *infra*.

Admissible.

fied infants were found buried in the gardens of other houses occupied by A., is admissible to rebut the defence that B.'s death was accidental (*Makin v. A.-G. of N.S.W.*, 1894, A. C. 57).

A. is charged with indecently exposing himself, in July, to B., a female, with intent to insult. Held: A. might be asked on cross-examination whether he had not done the same thing and about the same hour, to B. in the previous May; and, on A.'s denial, that B. might be called to rebut such denial. The evidence was admitted (1) to show that B. was not mistaken in her identification of A.; (2) to show that A.'s act was wilful and not accidental; and (3) that it was done with the intent charged (*Perkins v. Jeffrey*, 1915, 2 K. B. 702).

Inadmissible.

A. is charged with burglary with intent to ravish B. Evidence that an hour later A. entered another house, down the chimney, and had connection with C., with C.'s consent;—Held, not admissible to show A.'s intent to ravish B. (*R. v. Rodley*, 1913, 3 K. B. 468).

In *Perkins v. Jeffrey*, *opposite*, evidence, by other witnesses, of a systematic course of similar conduct by A. to females other than B. was not admitted, since the *dates* of the acts were not shown and it did not *clearly appear* that the defence that the act charged was not wilful, nor with intent, would be relied on [The latter ground, however, appears to be inconsistent with the admission of (2) and (3) *opposite*].

CHAPTER XI.

CHARACTER.

[186-192.]

CHARACTER IN ISSUE.—When a party's general character is itself *in issue*, proof must necessarily be received of what that general character is, or is not. Such proof may consist either of direct testimony as to the character involved, or of particular instances in which it has been manifested.

CHARACTER NOT IN ISSUE.—When, however, character is tendered in proof or disproof of some *other* issue, it is usually excluded, not because logically irrelevant, but on grounds of policy and fairness, since its admission would cause surprise and prejudice to the parties by raking up the whole of their careers, which they could not be prepared to defend without notice.

Thus, in criminal cases, to prove that the defendant committed the crime charged, evidence may not be given either that he bore a bad *reputation* in the community, or that he had a *disposition* to commit crimes of that kind (*R. v. Rowton*, 1 L. & C. 520; *ante*, 43). So, in divorce cases, the husband cannot, in disproof of a particular act of cruelty, tender evidence of his general character for humanity (*Narracott v. Narracott*, 33 L. J. P. & M. 61).

Exceptions.—To this exclusionary rule, however, there are some exceptions, involving the character of the *parties*; of *third persons*; and of character as affecting *damages* and *witnesses*.

(a) Character of the Parties.

Prisoner's Character. — In criminal cases, the prisoner is, on grounds of humanity, allowed the privilege of proving his *good character* (either in chief, or by

cross-examination), for the purpose of raising a presumption of his innocence of the crime charged.

The character proved must be of the *specific kind impeached*—*e.g.*, honesty where dishonesty is charged; must refer to a *date proximate to the charge*; and must be *general*, and not relate to particular instances (Taylor, s. 351). In strictness, also, it has been held, the witness should depose not to his own individual *opinion* of the prisoner's character, but to the latter's *reputation* in the community. In practice, however, the question always put is, "What is the prisoner's character for honesty, morality, or humanity?" as the case may be; nor is the witness ever warned to confine his testimony to the prisoner's general reputation (Stephen, Dig. Note xxvi.).

Bad Character in Rebuttal.—Whenever the accused gives evidence of good character, either by cross-examination, or by his own or others' testimony, the prosecution may rebut it. Thus, the prisoner's witnesses to character may (though this is not usual unless on specific material), be cross-examined by the prosecution; and, in rebuttal only, evidence may also be given of the prisoner's *general bad character* (though this is rarely tendered), as well as, in certain cases, and *before* the jury return their verdict, of his *previous conviction* for crime. [The cases are those in which (1) the indictment charges *any* offence as having been committed after a previous conviction, and the accused gives evidence of his good character (Larceny Act, 1861, s. 116, construed in *Faulkner v. R.*, 1905, 2 K. B. 76, to be of general application and so, in effect, to render superfluous several statutory provisions on the subject); or (2) the accused sets up his own good character, or impeaches that of the witnesses for the prosecution, or gives evidence against a co-defendant (Cr. Ev. Act, 1898, s. 1 (f)). Though the Act speaks only of questions put to the accused in cross-examination, the convictions may either be elicited from him or his witnesses, or proved independently; *post*, 137-8, 152, 170)].

Previous Convictions Generally.—Previous convictions may not be proved *before* verdict, except in the

following cases: (1) In *rebuttal of good character*, as above; (2) when forming an *essential ingredient of the offence*, i.e., when the act is only an offence if done after a previous conviction (*R. v. Penfold*, 1902, 1 K. B. 547; *Faulkner v. R.*, *supra*); (3) when *relevant to prove the offence itself*, e.g., to show *scienter* in receiving cases (*ante*, 46-7), or intent under the Vagrancy Act, 1824 (*Clark v. R.*, 14 Q. B. D. 92); (4) *to contradict a witness* who has denied his previous conviction (*post*, 152); (5) to prove *public rights* (*Petrie v. Nuttall*, *post*, 131); (6) to prove a plea of *autrefois convict*; (7) to rebut a claim to property made by or through the convict (*R. v. Crippen*, *post*, 128). Previous convictions may also be proved *after verdict* to increase punishment, e.g., to show that the accused is an habitual criminal.

(b) **Character of Others.**—On charges of **Rape**, or attempts to ravish, the *general bad character* of the prosecutrix, who is not strictly a party to the proceedings, is admissible in defence, whether she be or be not cross-examined. And to show consent, she may be cross-examined as to *other immoral acts with the prisoner*, and if she denies these they may be independently proved (*R. v. Riley*, 18 Q. B. D. 481). She may also be cross-examined as to such acts with *other men*, but she may decline to answer, and if she deny them, they cannot be independently proved (*R. v. Cockroft*, 11 Cox 410; *R. v. Holmes*, 12 Cox 137). On issues of **Legitimacy**, the ill-fame of the child's mother may be proved (*Pendrell v. Pendrell*, 2 Str. 924). So, perhaps, in cases of **Divorce**, the general immoral character of the woman with whom the husband's adultery is charged (*Butchart v. B.*, *ante*, 45). And on trials for **Murder**, the character of the deceased, e.g., for violence or depravity, is admissible in mitigation of the act (*R. v. Macarthy*, 2 Russ. Cr., 7th ed., 2092 n.; *R. v. Biggin*, 1920, 1 K. B. 213).

(c) **Character as affecting Damages.**—In civil actions, good character being presumed, may not (except in rebuttal) be proved in *aggravation of damages*; but in cases of *defamation and breach of promise* the bad character of the plaintiff, and in actions for

seduction, and petitions for *damages for adultery*, the bad character of the woman betrayed, may be proved in *chief* in *reduction* of damages. [Sir J. Stephen extends this to *all* civil cases (art. 57); *contra*, Taylor, 8th ed. s. 356; Mayne, *Damages*, 9th ed. 462-89; Arnold, *Damages*, 2nd ed. 25 *n.*, who confine it to the four cases mentioned]. In defamation cases, where the defendant does not plead the *truth* of the imputation, such evidence is only admissible by leave of the judge, or after seven days' notice (O. 36, R. 37).

(d) **Character of Witnesses.**—The character of a witness, whether party or not, is always material as affecting credit (*post*, 151-153). As to prisoner-witnesses, however, see *ante*, 50, *post*, 137-8.

CHAPTER XII.

FACTS EXCLUDED BY PUBLIC POLICY OR PRIVILEGE.

[194-217.]

PUBLIC POLICY.—Evidence of the following matters is excluded on grounds of public policy:—
 (1) Affairs of State; (2) Information given for the detection of crime; (3) Judicial disclosures; and (4) Statements by parents bastardising their offspring.

(1) **Affairs of State.**—Witnesses will not, without the express leave of the head of the department, be allowed to state facts or produce documents the disclosure of which would be prejudicial to the public service, *e.g.*, communications between the Governor of a Colony and the Secretary of State, or a report by a military court to the commander-in-chief as to the conduct of an officer.

(2) **Information for the Detection of Crime.**—Nor, in *public* prosecutions, informations for fraud committed against the revenue laws, or civil proceedings arising out of either, will they be allowed to disclose the channels through which information has been obtained by the executive, unless the judge considers that such disclosure is necessary to show the innocence of the accused (*Marks v. Beyfus*, 25 Q. B. D. 494). In *private* prosecutions, the judge has a discretion to allow such questions, if he considers them not injurious to the administration of justice (Steph. art. 113).

(3) **Judicial Disclosures.**—*Judges* of the superior courts cannot be compelled to testify to matters which

arose before them in their judicial capacity (*R. v. Gazard*, 8 C. & P. 595); nor can *Barristers* be compelled to disclose matters which were stated by them when conducting a case (*Curry v. Walter*, 1 Esp. 456). And neither grand, nor petty, *jurors* may testify as to what passed before them in the discharge of their duties (Steph. art. 114). *Private Examinations* in Bankruptcy, Winding-up, and Lunacy, are also, in general, protected from disclosure.

(4) **Statements by Parents bastardising their Offspring.**—Where the legitimacy of a child born in wedlock is in question, neither the testimony, nor the declarations out of court, of the parents are admissible to prove their *access* or *non-access* during marriage; though either fact may be proved by other means (*Poulett Peerage*, 1903, A. C. 393).

This rule, however, is confined to direct issues of legitimacy, and to the particular ground of access during marriage: thus, questions as to access, or non-access, may be put in divorce proceedings (*Nottingham Guardians v. Tomkinson*, 4 C. P. D. 343).

PRIVILEGE.—The following matters are protected from disclosure on the grounds of privilege:—(1) Professional confidences; (2) Title-deeds and Evidence; (3) Matrimonial communications; (4) Criminating questions; and (5) Admissions of adultery in divorce cases.

The privilege may be that either of the witness himself, or of another whom he represents; in the former case he will *not be compelled*, and in the latter he will *not be allowed* (without the principal's consent), to disclose the protected matter. The claim, which may be made at any stage of the examination, its allowance protecting the witness from all further answers, is determinable by the judge, who may himself inspect an alleged privileged document. If, however, the privileged document, or secondary evidence thereof, has been obtained by the opponent independently, even by

illegal means, the evidence will, contrary to the rule as to Public Policy, be received (*Calcraft v. Guest*, 1898, 1 Q. B. 759).

(1) **Professional Confidences.**—A client (whether party or stranger) cannot be compelled, and a legal adviser (whether barrister, solicitor, or the clerk or intermediate agent of either) will not be allowed, without the express consent of his client, to disclose communications, or to produce documents, passing between them in professional confidence.

Scope of the Rule.—The privilege is strictly confined to *legal advisers*, and does not protect confidential communications made to *priests, doctors, agents, friends, or servants*. Nor does it extend to communications passing *before* the relation existed, or *after* it has ceased; nor to those made to a lawyer consulted merely as a friend (*Smith v. Daniell*, 44 L. J. Ch. 189). Moreover to be protected, the matter must be within the *ordinary scope of professional employment*, though it need not involve actual or prospective litigation. Thus, communications in furtherance of a fraud or crime are not privileged, even though the solicitor was ignorant of the fraud (*R. v. Cox*, 14 Q. B. D. 153; *Williams v. Quebrada Ry.*, 1895, 2 Ch. 751).

Joint Interest.—No privilege, however, attaches as against persons jointly interested with the client (*e.g.*, partners; directors and shareholders; or trustee and beneficiary); nor between joint claimants under the same client. And where two clients employ the same solicitor, only communications in the *separate*, and not in the *joint*, capacity are privileged.

Duration of Privilege. Waiver.—A communication or document “once privileged is always privileged” (*Calcraft v. Guest*, 1898, 1 Q. B. p. 761). Thus, it is not lost in future litigation; on change of solicitors; or on death of the client.

It may, however, be waived by the client (though not by the solicitor), either expressly or impliedly—*e.g.*, by the client examining the solicitor as to the privileged matter; though, if only examined as to part, he cannot be cross-examined as to other parts.

EXAMPLES.

(i) *Client's Name, Address, Handwriting, Identity, Retainer.**Privileged.*

A solicitor will not be allowed to disclose his client's *address* if it has been confidentially communicated to him for a lawful purpose (*Re Arnott*, 60 L. T. 109).

Not Privileged.

A solicitor may be compelled to prove his client's *name, handwriting, identity*, and the fact and character of the *retainer* (*Dwyer v. Collins*, 7 Ex. 646; *Beckwith v. Benner*, 6 C. & P. 682).

(ii) *Legal Opinions, Drafts, and Communications.*

Cases submitted to solicitor or counsel, and opinions thereon (*Reece v. Trye*, 9 Beav. 316); drafts of agreement, etc. (*ibid.*); notes of professional interviews; confidential correspondence for the purpose of asking or giving legal advice, or entries in Bills of Costs relating thereto and which are not mere records of proceedings in Court (*Ainsworth v. Wilding*, 1900, 2 Ch. 315).

Opinion of counsel, effect of which is set out in pleadings (*M. of Bristol v. Cox*, 26 Ch. D. 678); communications which are *not necessary for the purpose of the employment*—e.g., a prosecutor's remark that "he would give a large sum to have his adversary hanged" (*Annesley v. Anglesea*, 17 St. Tr. 1224); or those relating to *matters of fact*, as distinguishing from *legal advice* (*Lyell v. Kennedy*, 9 App. Cas. 84).

(iii) *Solicitor's or Client's Knowledge. Client's Documents.*

Solicitor's or client's knowledge derived from *privileged communications* (*Lyell v. Kennedy*, 9 App. Cas. 81).

Solicitor's or client's knowledge derived from *independent sources* (*Wheatley v. Williams*, 1 M. & W. 533); or derived from the employment, but as to mere *facts patent to the senses* (*Lyell v. Kennedy*, *opposite*).

A solicitor is not entitled to withhold his client's deeds unless the client himself would be so entitled (*Bursill v. Tanner*, 16 Q. B. D. 1), nor those which are of a public nature (*R. v. Woodley*, 1 M. & R. 390; nor those entrusted to him for extraneous purposes, or which others were also intended to see (*Doe v. Hertford*, 19 L. J. Q. B. 526).

(iv) *Matters publici juris. Briefs and pleadings Communications from Strangers.*

Copies or extracts from records or registers, if these involve pro-

Records and registers, or mere copies thereof; for these are

Privileged.

professional skill and would disclose the solicitor's view of the case (*Lyell v. Kennedy*, 27 Ch. D. 1.).

Indorsements on brief as to private matters; or solicitor's instructions and witness' proofs therein (*Nicholl v. Jones*, 2 H. & M. 588; *Lamb v. Orton*, 22 L. J. Ch. 713).

Reports obtained from third persons, either by the client for submission to the solicitor (*Southwark Co. v. Quick*, 3 Q. B. D. 315); or by the solicitor for purposes of litigation (*Woolley v. N. L. Ry.*, L. R. 4 C. P. 602).

Not Privileged.

publici juris (*Lyell v. Kennedy*, *opposite*).

Indorsement on briefs of orders of court; or contents of brief when *publici juris*, e.g., copy of pleadings filed in former action (*Nicholl v. Jones* and *Lamb v. Orton*, *opposite*).

Reports obtained from third persons either by the client otherwise than for submission to the solicitor (*Woolley v. N. L. Ry.*, *opposite*); or by the solicitor otherwise than for purposes of litigation (*Wheeler v. Le Marchant*, 17 Ch. D. 675).

(2) **Title Deeds. Evidence.** — A witness, if a *stranger*, cannot be compelled to produce the title-deeds of his property (*Doe v. Date*, 3 Q. B. 609); nor can a *party* be compelled to produce documents which he swears relate solely to his own *title* or *case*, and do not tend to support the title or case of his adversary (*Morris v. Edwards*, 15 App. Cas. 309; *O'Rourke v. Darbishire*, 1920, A. C. 581).

(3) **Matrimonial Communications.** — “No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage” [16 & 17 Vict. c. 83, s. 3; Criminal Evidence Act, 1898, s. 1 (*d*)]. This rule, based on the need of securing absolute confidence during marriage, applies equally to parties and strangers; and probably covers all communications made during, or knowledge obtained by means of, the relationship, whether confidential or not; and continues after the marriage has been dissolved by death or divorce. But no protection exists as to communications made *before* marriage; or knowledge obtained during it, but from *extraneous* sources; and the evidence if either voluntarily given, or proved by an independent witness who overheard it, will be admissible.

(4) **Criminating Questions.**—No witness (whether party or stranger) is, except in the cases hereafter mentioned, compellable to answer any question (or to produce any document, *Spokes v. Grosvenor Hotel*, 1897, 2 Q. B. 124), the tendency of which is to expose the witness, or the wife or husband of the witness, to any *criminal charge, penalty, or forfeiture*; the maxim being *Nemo tenetur prodere seipsum*.

Scope of the Rule.—The witness is protected as to crimes cognisable by foreign as well as by English law; and not only as to direct criminal acts, but as to perfectly innocent matters forming links in the chain of proof.

Answers tending, however, merely to establish a *debt*, or to subject to *civil liability* short of penalty or forfeiture (46 Geo. III. c. 37); or implicating *co-defendants* (*Kelly v. Colhoun*, 1899, 2 I. R. 199), are not protected. Nor is an incriminating *public document* which is in the witness' custody (*Bradshaw v. Murphy*, 7 C. & P. 612).

Oath necessary, but not conclusive.—The oath of the witness that he believes the answer will, or may, tend to incriminate him is necessary, but not conclusive; for the Court must be satisfied from the circumstances of the case, and the nature of the evidence the witness is called to give, that reasonable danger exists (*R. v. Boyes*, 1 B. & S. 311; *Re Reynolds*, 20 Ch. D. 294).

Privilege ceases with Liability.—If the time for proceeding has expired, or the penalty been waived, or the witness already been convicted, acquitted, or pardoned, the protection will cease.

Exceptions.—Under the *Criminal Evidence Act*, 1898, s. 1, sub-s. (e):—A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to *the offence charged*; but by sub-s. (f) he shall not be asked nor compelled to answer questions tending to show that he has committed *other offences*, except under the conditions stated, *post*, 137-8. So, under the *Bankruptcy Acts*, 1883, s. 17, and 1914, s. 15, debtors cannot refuse to

answer questions touching their conduct, dealings, or property, on the ground of self-crimination; and their answers are evidence against them in subsequent criminal proceedings (*R. v. Erdheim*, 1896, 2 Q. B. 260). And under the *Larceny Act*, 1861, s. 43, and a few other statutes, witnesses may be compelled to answer criminating questions, subject to a certain measure of indemnity in respect thereof.

(5) **Admissions of Adultery in Divorce Cases.**—"In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, *provided* that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he, or she, has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery" (32 & 33 Vict. c. 68, s. 3).

Scope of the Rule.—The section refers only to divorce proceedings (*Nottingham Guardians v. Tomkinson*, 4 C. P. D. 343); and the proviso affords no protection to the witness in other cases (*Evans v. Evans*, 1904, P. 378). Moreover, even in divorce cases, if the witness consents, the evidence will be receivable.

CHAPTER XIII.

HEARSAY.

[218-226.]

ORAL or written statements made by persons not called as witnesses are not receivable to prove the *truth* of the facts stated, except in the cases hereinafter mentioned.

Original Evidence and Hearsay distinguished.—Statements by non-witnesses may, as we have seen (*ante*, xii., 2), be either original evidence—*i.e.*, where the statement is relevant independent of its truth, and is not to be taken as any proof of the latter; or hearsay—*i.e.*, where the statement is offered to prove the truth of the matter asserted; the test being the purpose for which it is tendered.

Under the former head fall the various declarations hitherto treated of—*viz.*, statements which are part of the *res gesta*; statements amounting to acts of ownership, as leases, licences, and grants, the operative parts being original evidence, but the recitals hearsay and inadmissible except against the parties thereto; and statements constituting motive, conveying notice, showing good or bad faith, or corroborating or contradicting the testimony of witnesses. To which may be added conversations admitted to enable a witness to fix a date and inquiries and answers tendered to the judge to show reasonable search for a lost document or an absent witness.

The hearsay rule applies only to *statements*, and not, according to the better opinion, to *conduct* (*ante*, 29, 30).

Grounds of Exclusion.—The grounds usually assigned for the rejection of hearsay evidence are—(1) the irresponsibility of the original declarant; (2) the depreciation of truth in the process of repetition; and (3) the opportunities for fraud its admission would open; to

which is sometimes added (4) the tendency of such evidence to protract legal inquiries, and encourage the substitution of weaker for stronger proofs. The only really essential objections, however, are the absence of an *oath* and of *cross-examination*, the presence of the witness being valuable mainly as a means of securing these, and being in some cases waived without entailing the exclusion of his testimony (*post*, 132, 143). Some writers consider hearsay excluded on grounds of *irrelevancy*; but that term seems misapplied in the present connection, since not only are the rules as to relevancy and credibility essentially different, but whereas the former is admittedly based upon logical inference, the latter is often considered to rest rather upon instinct confirmed by experience, there being no known law which entitles us to conclude that voluntary communications truthfully represent the knowledge of the speaker. In any case, hearsay, far from being generally "irrelevant" or inaccurate, is, in the vast majority of instances, inherently credible, although, on grounds of caution, it is only admitted as legal evidence in excepted cases and in its more cogent forms.

EXAMPLES.

In an action between A. and B. to prove that C., a debtor, was abroad at a certain time, a statement that he was so, made by C.'s servant in answer to inquiries at his house, is inadmissible [*Robinson v. Markis*, 2 M. & R. 375; *aliter* as original evidence of an unsuccessful search for C., *Wyatt v. Bateman*, 7 C. & P. 586].

A. sues B. for goods sold, to which B. pleads infancy. An affidavit by B.'s father (deceased) stating the date of B.'s birth, and made in a former action to which A. was not a party, is inadmissible to prove B.'s age [*Haines v. Guthrie*, 13 Q. B. D. 818. Such an affidavit might have been admissible had the parties been the same (*post*, 132; or had the question been one of *pedigree* (*post*, 95, 97)].

A., a post-office official, is charged with secreting a letter containing a bill of exchange, both found upon him. The letter, which stated that the bill was enclosed, was held evidence against A. as found in his possession, but not as proof that the bill was enclosed (*R. v. Plumer*, R. & R. 264; *post*, 73, 75).

The question being whether a certain deed was forged;—a statement made by the attesting witness (deceased) that it was forged, is inadmissible (*Stobart v. Dryden*, 1 M. & W. 615; *post*, 83).

A. is charged with the murder of B.;—a death-bed confession made by C. that he, and not A., had committed the murder, is inadmissible (*R. v. Gray*, Ir. Cir. Rep. 76; *post*, 79, 99).

CHAPTER XIV.

EXCEPTIONS TO THE HEARSAY RULE. ADMISSIONS.

[227-236.]

THE rule excluding hearsay is subject to three main classes of exceptions:—(i) Admissions; Statements made in the presence of a party; and Confessions; (ii) Statements made by persons since deceased; and (iii) Statements contained in public documents. When falling within these exceptions, hearsay evidence of facts is admissible, although direct testimony as to such facts might have been obtained.

Similar evidence may, within certain limits, also be received on a summons for directions (O. 30, r. 7), in taking accounts (O. 33, r. 3), and in interlocutory proceedings.

ADMISSIONS.—In civil cases, statements made by a party to the proceedings, or by a person connected with him in any of the ways mentioned in chap. XV., are admissible *against*, but *not in favour of*, such party, to prove the truth of the facts stated.

Principle.—The ground of reception is, not, as sometimes supposed, that such admissions constitute a *waiver of proof*, for this can only apply to those made expressly with a view to trial (*ante*, 7); nor that they were *against interest* when made, for his adversary may prove them even if they were not so; nor that they are *inconsistent with the case* of the party making them, for they would be receivable for his adversary even if consistent with the former's case; but simply that a party's declarations may always be *presumed to be true as against himself*. No presumption of truth, however,

arises with regard to the declarations of a party or his agents when tendered *in his own favour*, sometimes called "making evidence for himself," otherwise every man if he were in a difficulty, or in view of one, might make declarations to suit his own case; such declarations, therefore, though often admissible for him as original evidence, are excluded as evidence of the *truth* of the facts stated. [As to admissions for dispensing with proof at the trial, see *ante*, 7; and as to admissions and confessions in criminal cases, *post*, 77.]

Circumstances of the Admission.—The circumstances of an admission may always be proved to impeach or enhance its credibility. Thus, it may (unless amounting to an estoppel) be shown by the party against whom it is tendered, to be untrue; or made under a mistake of law or fact; or uttered in ignorance, levity, or an abnormal condition of mind. On the other hand, its weight increases with the deliberation of the speaker and the solemnity of the occasion. When a party is sued *personally*, an admission made by him in a *representative* character is evidence against him, but not *vice versâ*.

Offers without Prejudice.—Offers of compromise made expressly or impliedly "without prejudice" cannot, on grounds of public policy, be given in evidence against a party, even on a question of costs (*Walker v. Wilsher*, 23 Q. B. D. 335). Such offers, however, are only protected if *bonâ fide* made with a view to a compromise (*Re Daintrey*, 1893, 2 Q. B. 116). Thus, a letter "without prejudice" which contains a threat if the offer be refused, is admissible to prove such threat (*Kurtz v. Spence*, 58 L. T. 438). Moreover, independent facts admitted during negotiations for a settlement are receivable (*Waldridge v. Kennison*, 1 Esp. 143). And an admission made by a party, without prejudice, but on a condition which he afterwards violates, is evidence against him (*Holdsworth v. Dimsdale*, 19 W. R. 798). On the other hand, an admission made upon one hypothesis of fact, will not bind a party upon a different one (*Powell v. McGlynn*, 1902, 2 I. R. 154, C. A.).

Whole Statement.—When an admission is tendered against a party, he is entitled to prove so much of the whole statement, document, or correspondence containing, or referred to in, the admission, as is necessary to explain the admission, and although such other parts may be favourable to himself; but the jury may attach different degrees of credit to the different parts. *Distinct* matters, however, though relevant to the case, cannot be so introduced (*Prince v. Samo*, 7 A. & E. 627; *cp. post*, 79, 84, 154).

An admission is receivable, although its weight may be slight, which is founded on *hearsay*, or consists merely of the declarant's *opinion* or *belief*.

EXAMPLES.

Admissible.

A. sues B. for the price of goods sold;—an entry in A.'s shop-books debiting C. and not B. with the goods, is evidence against A. to disprove the debt (*Storr v. Scott*, 6 C. & P. 241).

A., when defending a suit as guardian for B., a minor, makes an affidavit of certain facts. This affidavit is evidence against A. of the facts sworn to, in a subsequent action against him personally (*Beasley v. Magrath*, 2 Sch. & Lef. 34).

A. sues B. on a bill of exchange. B. during confidential negotiations for a settlement, admits the signature of the bill to be his. This is receivable against B., though the rest of the negotiations are not (*Waldridge v. Kennison*, 1 Esp. 143). So, where B. wrote, "without prejudice," that he would waive A.'s omission to give him notice of dishonour, if A. would accept the debt without costs, and A. accepted, but B. did not pay;—Held, in a fresh action, that B.'s admission was receivable (*Holdsworth v. Dimsdale*, 19 W. R. 798).

Inadmissible.

A. sues B. for the price of goods sold;—an entry in A.'s shop-books, debiting B. with the goods, is not evidence for A. to prove the debt (*Smith v. Anderson*, 7 C. B. 21).

A. makes an admission of certain facts. Afterwards A. is appointed executor of B. In an action brought by him as such executor, his previous admission is not receivable against him (*Legge v. Edmonds*, 25 L. J. Ch. 125).

A. sues B. on a bill of exchange. B., in a letter "without prejudice," offers to pay the debt without costs. A. refuses the offer. B.'s letter is not receivable against him as an admission of liability (*practice*).

A. sues B. for injuries caused by B.'s horse when driven by C., who was alleged to be B.'s servant acting within the scope of his employment. Evidence being given that in answer to a remark by A.'s daughter made to B. that "she believed he had lent the horse to C." A. had replied, "Humph," adding that if she would take

Admissible.

A. is charged with being an habitual criminal over the age of 16. An admission by A. that he was over 16, or evidence of that fact, though necessarily founded on hearsay (*R. v. Turner*, 1910, 1 K. B. 346). So, an admission by A., deceased, that he was illegitimate, is evidence of that fact against his representatives in civil proceedings (*Re Perton*, 53 L. T. 707).

Inadmissible.

A. home from the hospital, he (B.) would pay all expenses. Held, B.'s offer being made on the basis of his having *lent* the horse to C., could not be used as a basis for C. being his *servant* (*Powell v. McGlynn*, 1902, 2 I. R. 154—C. A.).

CHAPTER XV.

PERSONS WHOSE ADMISSIONS MAY BE EVIDENCE AGAINST
A PARTY.

[237-254.]

A PARTY to the proceedings may be affected by the admissions of those standing in the following relations to him :—

- (A) Predecessors in title.
- (B) Nominal and real parties. Representative and principal.
- (C) Partners, joint-contractors, and co-representatives.
- (D) Agents, referees, etc.

Admissions made by such persons are (unless amounting to estoppels) only *prima facie* evidence, and may be contradicted or explained in the same way as those made by the party himself. The admissions of a party, however, are, as we have seen, generally receivable against himself *whenever* made, while those of others can only affect him when made during the *continuance of, and with reference to, the particular character or interest* entitling them to be proved.

Privity.—The cases in this chapter are often referred to under the head of *Privity*, a term which denotes successive or mutual relationship to the same rights of property. The grounds upon which admissions are evidence against those in privity with the party making them is, that they are *identified in interest*. Privies are of three classes: (1) privies in *blood*, as heir and ancestor, co-parceners, or co-heirs in gavelkind; (2) privies in *law*, as executor to testator, or adminis-

trator to intestate (sometimes called privies in representation); husbands suing or defending in right of their wives; lords by escheat; tenants by the curtesy, or in dower; (3) privies in *estate or interest*, as vendor and purchaser, grantor and grantee, donor and donee, lessor and lessee, joint-tenants, successive bishops, rectors, or vicars.

(A) **Predecessors in Title.**—Statements made by persons while in *possession* of property, qualifying or affecting their title thereto, are receivable against a party claiming through them by title *subsequent* to the admission.

The rule is only co-extensive with the identity of interest. Thus, admissions by the holder of a subordinate title are not receivable to affect the estate of his superior, which he has no right to alienate or encumber—*e.g.*, those of an occupier, his landlord's title; or those of a tenant for life, the title of the remainderman or reversioner; although, when a tenant for life, or in tail, can be regarded as representing the inheritance, his admissions will be receivable against a remainderman.

A distinction, however, must be taken between the case of an assignee of *land* or other property, and that of an ordinary assignee of a *negotiable instrument*, the former having in general no title in law or equity unless his assignor had, while the latter may have a good title though his assignor had none. Accordingly, unless the plaintiff on a bill or note stands on the title of the former holder (*e.g.*, by taking the bill when overdue, or with notice, or without consideration), the declarations of such holder are not evidence against him (Byles on Bills, 17th ed. p. 432).

(B) **Nominal and Real Parties. Representative and Principal.**—A nominal party may be affected by the admissions of a real party, who, though not named on the record, has a *substantial interest* in the result.

The admissions must, however, have been made while the real party was actually interested; and are only receivable so far as his own interests, or the interests of those who claim through him, are con-

cerned. Thus, the admissions of a *cestui que trust* are evidence against his trustee, so far as their interests are identical (*Harrison v. Vallance*, 1 Bing. 45); those of a shipowner against the master, in an action by the latter for freight (*Smith v. Lyon*, 3 Camp. 465); and those of the persons interested in a policy, against the party in whose name the policy was effected (*Bell v. Ansley*, 16 East. 143).

Conversely, the admissions of a representative, while sustaining that character, even though he be a mere nominal party or bare trustee, are receivable against his principal (*Legge v. Edmonds*, 25 L. J. Ch. 125; *News' Trustee v. Hunting*, 1897, 2 Q. B. 19). This, however, does not apply to a guardian or next friend, who is merely an officer of the court, appointed for the infant's protection; moreover, the admissions of an executor, though receivable against a legatee (*Concha v. Concha*, 11 App. Cas. p. 553), are not so against the heir or devisees (*Putnam v. Bates*, 3 Russ. 188).

(C) **Partners, Joint-Contractors, Co-representatives, &c.**—An admission, or representation, made by any partner concerning the partnership affairs and in the ordinary course of its business, is evidence against the firm (Partnership Act, 1890, s. 15); and an admission by one of several joint-contractors, concerning the joint-contract, is evidence against the rest, whether sued or suing jointly or severally.

The interest must be a joint, and not merely a common one. Thus, the admissions of joint-tenants and co-partners are receivable against the others; but not those of tenants in common; or of co-part-owners of a ship, as distinguished from co-partners therein (*Jaggers v. Binnings*, 1 Stark. 64). And the admissions must have been made *during the existence* of the joint interest. *Statutes of Limitation.* Where actions on simple contracts have become barred by the Statute of Limitations, no joint-contractor, or his personal representative, shall lose the benefit of the statute by reason only of any written *acknowledgment* or *promise* signed by any other joint-contractor or his representative (9 Geo. IV. c. 14, s. 1); or by the duly authorized

agent of either (19 & 20 Vict. c. 97, s. 13). Nor shall any co-contractor or co-debtor (or his personal representative), whether bound jointly, or jointly and severally (or severally only: *Re Wolmerhausen*, 38 W. R. 537), lose the benefit of the statute by reason only of any *payment* of any principal, interest, or other money, by any other co-contractor, &c. (19 & 20 Vict. c. 97, s. 14); even though such payment is made with the knowledge and consent of the co-debtors (*Jackson v. Woolley*, 27 L. J. Q. B. 181).

Principal and Surety.—Declarations by a principal made during the transaction of the business for which the surety is bound, so as to become part of the *res gesta*, are evidence against the surety; but his mere admissions, subsequently made, are not, since, as the surety contracts with the creditor, there is no privity between the principal and himself (*Bain v. Cooper*, 9 M. & W. 701; Tay, ss. 785-6).

Co-representatives.—An admission of the receipt of money by one of several trustees, who are personally liable, will bind the others (*Skaife v. Jackson*, 3 B. & C. 421); though *aliter* if not so liable (*Jago v. Jago*, 68 L. T. 654). So, the admissions of an executor made in his representative character will bind his co-executors in their representative, though not in their personal, capacity (*Re Macdonald*, 1897, 2 Ch. 181; *Astbury v. Astbury*, 1898, 2 Ch. 111).

Co-defendants.—The admissions of co-defendants, merely as such, are not receivable against each other, for there is no issue joined between them, and no opportunity for cross-examination; besides which, the plaintiff might, by joining a friend as defendant, gain an unfair advantage (Tay, s. 754). Similarly the admissions of a respondent are not receivable against the co-respondent; so that a wife may, on proof of a confession, be found to have committed adultery with the co-respondent, but the latter not to have committed adultery with her (*Crawford v. Crawford*, 11 P. D. 150).

(D) **Agents, Referees, &c.**—The admissions of an agent are receivable against his principal (1) when the

agent is expressly authorized to make them; (2) when the agent is authorized to represent the principal in any business, and the admissions relate to, and are made in the ordinary course of, such business.

Past Transactions. Reports to Principal.—If the agent's admissions were made concerning, and in the ordinary course of, the principal's business, it is immaterial whether they relate to past or present events; though, if the business on which the agent is employed is at an end, his subsequent admissions regarding it will be rejected. An agent's reports to his principal are not evidence against the latter as admissions (*Re Devala Co.*, 22 Ch. D. 593; *Cooper v. Met. B. of W.*, 25 Ch. D. 472), unless the principal has *replied* thereto, when the letters of the latter will be admissible as explanatory of the statements of the former (*Coates v. Bainbridge*, 5 Bing. 58).

The following are some of the chief cases in which principals may be affected by the admissions of their agents:—

Corporations and their Officers.—The *manager* of a banking company may make admissions against the bank as to its practice in making loans to customers (*Simmons v. London Bank*, 62 L. T. 427). So, the *directors* of a company when acting for it in the course of a transaction with a third person; but not in their confidential reports to a meeting of the shareholders (*Re Devala Co.*, *supra*).

On the other hand, the *secretary* of a company cannot (unless acting under the express orders of the directors) make admissions against the company, even as to the receipt of a letter (*Bruff v. G. N. Ry.*, 1 F. & F. 345). The admissions of a *station-master* have been held evidence against the company as to property lost at his station when subsequently, in the course of his duty, giving information to the police as to such loss (*Kirstall v. Furness Ry.*, L. R. 9 Q. B. 468); but not those of a *night-inspector* (*G. W. Ry. v. Willis*, 18 C. B. N. S. 748).

Contractor and Workman.—In an action against a contractor for injury to his workman through the fall

of a bucket, an admission by a fellow-workman that the latter had not hooked the bucket securely because he was in a hurry, is not evidence against the contractor (*Johnson v. Lindsey*, 53 J. P. 599).

Landlord and Agent.—The admissions of a landlord or rent-collector, though evidence to prove the receipt of rent, are not receivable as to his landlord's title (*Ley v. Peter*, 3 H. & N. 101), nor as to the ownership of a disputed fence (*Henniker v. Howard*, 90 L. T. 157).

Husband and Wife.—A wife, merely as such, cannot affect her husband by her admissions; though he may, of course, constitute her his agent for that purpose either expressly or impliedly. Thus, where he allowed her to conduct the business of his shop in his absence, her admissions in the ordinary course thereof—*e.g.*, as to the receipt of shop goods, are evidence against him; though not her admissions outside the scope of her agency—*e.g.*, as to the terms of the tenancy (*Clifford v. Burton*, 1 Bing. 199).

Shipowner and Ship's Officers.—The captain of a ship may make admissions against the owners; but not the officers, crew, or pilot, except in the log (*The Solway*, 10 P. D. 137; *The Earl of Dumfries*, *ibid.* 31).

Client and Solicitor, Counsel, or Witnesses.—A solicitor, or his managing clerk or agent has, in civil, but not in criminal, cases implied authority to make admissions against his client during the actual progress of litigation, either for the purpose of dispensing with proof at the trial, in which case they are generally conclusive (*ante*, 7); or incidentally as to any of the facts of the case, when they amount only to *prima facie* evidence. Such admissions may be made in court, in chambers, or by documents or correspondence connected with the proceedings. But admissions before litigation has commenced (*Wagstaff v. Watson*, 4 B. & Ad. 339), or during it, but in mere conversation (*Petch v. Lyon*, 9 Q. B. 147), or to third persons, and not to the opposite party (*Wilson v. Turner*, 1 Taunt. 398), are not evidence against the client. Admissions by counsel stand upon a narrower footing, for while the

attorney represents the client throughout the cause, the former represents him only upon the particular occasion for which he is briefed (*Richardson v. Peto*, 1 M. & G. 896; *R. v. Greenwich*, 15 Q. B. D. 58). The testimony of a party's *witnesses* is not evidence against him in subsequent trials as an admission, unless expressly caused to be made, or knowingly used as true, to prove some particular fact, when the statements so used, but no other part of the testimony, will be receivable (*Richards v. Morgan*, 4 B. & S. 641; *post*, 74-6). Nor are *pleadings* in other actions evidence against a party as admissions, unless signed, sworn, or otherwise adopted by him.

Referrer and Referee.—When a party refers to a third person for information or an opinion on a given subject, the information or opinion so given is receivable against the referrer. And it will be conclusive where there has been an agreement to refer, or where the position of the party tendering it has been altered thereby.

It is immaterial whether the disputed matter be one of law or fact; whether the referee has, or has not, any peculiar knowledge on the subject; or whether the reference is made expressly, or by conduct evincing an intention to rely on the statement as correct (*Tay*, ss. 760-763).

Bankrupt and Creditors.—The admissions of a debtor made *before* his bankruptcy are receivable to prove the petitioning creditor's debt (*Coole v. Braham*, 3 Ex. 183); but if made *during* it, *e.g.*, in his statement of affairs, or public examination, they are not evidence against the trustee or the creditors, because of the danger of fraud (*Exp. Revell*, 13 Q. B. D. 720; *Re Brunner*, 19 *ibid.* 572).

Sheriff and Under-sheriff.—The admissions of an under-sheriff in his official capacity are evidence against the sheriff; but the relationship between them being that of principal and deputy (or *quasi-principal*), and not principal and agent, it is immaterial to inquire into the scope of the deputy's authority, for no action lies against him (*Snowball v. Goodricke*, 4 B. & Ad. 541).

CHAPTER XVI.

STATEMENTS IN THE PRESENCE AND DOCUMENTS IN THE
POSSESSION OF A PARTY.

[255-262.]

STATEMENTS made in the presence and hearing of a party to the proceedings, and documents in his possession, or to which he has access, are evidence against him of the truth of the matters stated, if by his conduct or silence he has acquiesced in their contents.

A party may, on similar grounds, be affected by the acquiescence of his agents or of others for whose admissions he is responsible (*Haller v. Worman*, 3 L. T. N. S. 741).

Principle.—The mere fact that statements have been made in a party's presence, or documents found in his possession, though it may render them admissible against him as original evidence—*e.g.*, as showing knowledge or complicity—will afford no proof *per se* of the *truth* of their contents; the ground of reception for the latter purpose is that the party has, by his words, conduct or silence, admitted the accuracy of the assertions made (*R. v. Christie*, *post*, 75; *R. v. Norton*, 1910, 2 K. B. 496; *R. v. Plumer*, *post*, 75).

STATEMENTS (a).—When statements made in a party's presence have been *replied to*, they will be evidence against him of the facts stated to the extent that his answer directly or indirectly admits their truth; while, where no admission can be inferred, it is a rule of practice, though not perhaps of strict law, that such statements should not be given in evidence (*ibid.*).

So, a party's *silence* will render statements made in his presence (or hearing only: *Neile v. Jackle*, 2 C. & K. 709) evidence against him of their truth, when he is reasonably called on to reply (*Wiedemann v. Walpole*, 1891, 2 Q. B. p. 539). And even where the matter is not within his knowledge, or the statements are not directly addressed to him, the evidence is strictly admissible, though its weight may be slight. But when the circumstances are such that a reply cannot properly be expected, the party's silence will afford no inference of assent, *e.g.*, when he is asleep, deaf, intoxicated (*Wright v. Tatham*, 5 C. & F. 701, 722), or the statement is the mere officious observation of a stranger (*Child v. Grace*, 2 C. & P. 193). So, statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he did not deny them, for the regularity of judicial proceedings prevents the free interposition allowed in ordinary conversation (*R. v. Turner*, 1 Moo. C. C. 347). Even here, however, cases may occur in which the refusal of a party to repel a charge made in a court of justice, or to cross-examine a witness, or reply to an affidavit, may afford a strong presumption that the imputations made against him are correct.

DOCUMENTS (b).—Documents in a party's possession which he has in any way *recognised, adopted, or acted upon*, are, generally speaking, evidence against him of the truth of their contents. So, also, those which he has *caused to be made or knowingly used as true* in a judicial proceeding to prove some particular fact (*Richards v. Morgan*, 4 B. & S. 641; *ante*, 72). The mere *failure to answer a letter or object to an account*, however, will not generally imply an admission of its contents, as in the case of statements made to a man's face; though it is otherwise where the party is *entitled to a reply* (*Wiedemann v. Walpole, supra*).

EXAMPLES.

Admissible.

(a) A. is indicted for receiving property alleged to have been stolen by B. A confession

Inadmissible.

(a) A. is indicted for receiving property alleged to have been stolen by B. A confession made

Admissible.

made by B. to a constable, in the presence of, and not denied by, A., that he (B.) had stolen the goods, is admissible against A. to prove that fact (*R. v. Cox*, 1 F. & F. 90).

A. sues B. for breach of promise of marriage; an oral statement made by A. to B. before the trial, "You know you always promised to marry me, and now you don't keep your word," to which B. made no answer, is admissible to prove the promise (*Bessela v. Stern*, 2 C. P. D. 265).

(b) In an action between A. and B. an affidavit which A. had, in a former suit between himself and C., knowingly used to prove a certain fact, is evidence

Inadmissible.

by B. to a magistrate on the hearing of the charge, in the presence of, and not denied by, A., that he (B.) had stolen the goods, is not admissible against A. to prove that fact (*R. v. Turner*, 1 Moo. C. C. 347).

A. sues B. for breach of promise of marriage; a letter written by A. to B., stating that B. had promised to marry her, to which letter B. did not reply, is not admissible either in proof or corroboration of the promise (*Wiedemann v. Walpole*, 1891, 2 Q. B. 534).

A. is charged with assaulting B.—Evidence that, five minutes after the alleged assault, B., having identified A., made a statement in A.'s presence to a constable of the details of the assault, to which A. replied "I am innocent"—Held, not admissible to prove the truth of B.'s statement. [*R. v. Christie*, 1914, A. C. 545. The evidence was also rejected (1) as part of the *res gesta* (*ante*, 19); (2) as corroboration (*post*, 157); or (3) as part of the act of identification.]

A. is charged with secreting a letter containing a bill of exchange. The letter, which stated that the bill was enclosed, was held evidence against A. as found in his possession, but not to prove that the bill was enclosed [*R. v. Plumer*, *ante*, 61. For a case in which subsequent possession of documents was rejected to prove former knowledge, see *R. v. Zulueta*, *ante*, 36, 41].

(b) In an action between A. and B., an affidavit which had, in A.'s absence and without his knowledge, been made and used by his attorney's clerk in an

. *Admissible.*

against A. of the same fact, though the deponent is present in court and might be called as a witness (*Brickell v. Hulse*, 7 A. & E. 454).

Inadmissible.

earlier stage of the same action, is not admissible against A. in proof of the facts stated (*White v. Dowling*, 8 Ir. L. R. 128).

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CHAPTER XVII.

CONFESSIONS.

[263-275.]

IN criminal cases, a confession made by the accused *voluntarily* is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against, him, and which has been induced by any promise or threat relating to the charge, and made by, or with the sanction of, a person in authority, is deemed *not to be voluntary*, and is inadmissible.

[Statements made by the accused *before* the crime, *e.g.*, as to his motives and intentions, or the instruments obtained to commit it, are receivable against him either as original evidence (*ante*, 18, 34, or admissions, irrespective of the above limitations.)]

Principle.—The ground of reception of voluntary confessions is that they may be taken to be true as against the accused *himself* (*ante*, 62). The ground of rejection of confessions which are not voluntary is the danger that he may have been induced, by hope or fear, to *criminate himself falsely* (*R. v. Baldry*, 2 Den. C. C. 430; *R. v. Thompson*, 1893, 2 Q. B. 12).

Burden of Proof. Corroboration.—It lies upon the prosecution to establish, and not upon the prisoner to negative, the voluntariness of the confession (*R. v. Thompson*, *supra*). And, except perhaps in cases of murder, bigamy, or crimes involving title to property, a confession duly made and satisfactorily proved is sufficient to warrant a conviction without corroboration (*R. v. Sullivan*, 16 Cox 347).

Persons in Authority (a).—To exclude a confession, the inducement must have been held out by a person in authority—*i.e.*, someone engaged in the *arrest, detention, examination, or prosecution* of the accused; or by someone acting in the presence, and without the dissent, of such a person;—*e.g.*, a magistrate, constable, prosecutor, or the latter's wife or attorney; but not (probably) the chaplain of the gaol, nor the captain of the prisoner's ship, nor the wife of a constable. And a confession made to, but not induced by, a person in authority is admissible; while, conversely, a confession induced by, though not made to, such a person will be rejected.

The Inducement (b).—A promise or threat, in order to exclude a confession, must *relate to the charge*—*i.e.*, must reasonably imply that the prisoner's position with reference to it will be rendered better or worse according as he does or does not confess. It need not be *express*, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case (*R. v. Gillis*, 11 Cox 69); nor need it be made *directly to the prisoner*; it is sufficient if it may reasonably be presumed to have come to his knowledge, *e.g.*, by having been communicated to his wife or relations, providing it appears to have induced the confession (*R. v. Thompson, supra*; *R. v. Chapple*, 17 Cox, 453).

A confession will not be excluded, however, which has been obtained merely by an inducement relating to some *collateral matter* unconnected with the charge; or by *moral or religious exhortation* (*R. v. Jarvis*, L. R. 1 C. C. R. 96; *R. v. Reeve, ibid.* 362); or, even by *questions* put by the police to the prisoner when in custody, provided no promise or threat was employed, though such a practice is improper and in extreme cases may justify the rejection of the confession (*R. v. Best*, 1909, 1 K. B. 692; *Ibrahim v. R.*, 1914, A. C. 599; *R. v. Gardner*, 1915, 85 L. J. K. B. 206). As to questions to him at the trial under the Crim. Ev. Act, 1898, &c., see *ante*, 58-9, *post*, 137-8. And evidence given on oath as a witness in a different (*R. v. Coote*,

L. R. 4 P. C. 605), or earlier stage of the same (*R. v. Bird*, 19 Cox 180), proceeding, is admissible against him as a confession, unless his testimony was obtained by improper inducement (*R. v. Gillis, supra*; *R. v. Colpus*, 1917, 1 K. B. 574), or he was unjustly compelled to answer the criminating questions after claiming privilege (*R. v. Garbett*, 1 Den. 236).

If the impression produced by a promise or threat is clearly shown to have been *removed*—*e.g.*, by lapse of time, or an intervening caution by some person of superior authority to that of the person who held out the inducement—a subsequent confession will be receivable.

Whole Statement. Confessions by Accomplices, &c.

—As with admissions, the *whole* of a confession must be taken, though parts may be favourable to the prisoner (*ante*, 64). But the prisoner can only be affected by the confessions of *himself*, and not by those of *agents, accomplices, or strangers*, unless made in his presence or assented to by him (*ante*, 73-4). Nor, of course, can such confessions be used in his favour (*R. v. Gray*, cited *ante*, 61, and *post*, 99).

A confession has been received though made when the accused was drunk (*R. v. Spilsbury*, 7 C. & P. 187), but not one made in his sleep (*R. v. Sippet*, cited Best, s. 529n).

Facts discovered in Consequence of Inadmissible Confessions (*c*).—The fact that property has been delivered up in consequence of an inducement to confess, or has been discovered through the help of an inadmissible confession, may always be proved, together with so much of the confession as strictly relates to such fact, for these portions at least cannot be untrue; but independent statements not qualifying or explaining the fact, though made at the time, will be rejected (*R. v. Gould*, 9 C. & P. 364). And if the inadmissible confession be *not confirmed* by the finding of the property, no proof either of the statements or acts can be received; for the influence which produces a groundless confession may equally produce groundless conduct (*R. v. Jenkins*, R. & R. 492).

EXAMPLES.

Admissible.

(a) A., a maid-servant, being charged with concealing the birth of her illegitimate child,* makes a confession in consequence of an inducement held out by her mistress;—the confession is admissible, for the mistress is not a person in authority, the offence having no connection with the management of the house (*R. v. Moore*, 2 Den. 522).

(b) Confessions induced by the following, from persons in authority, have been admitted:—

A promise to give the prisoner a glass of spirits (*R. v. Sexton*, cited Joy, 17-19, is *contra*, but is not law, *ibid.*; Tay. s. 880); or to let him see his wife (*R. v. Lloyd*, 6 C. & P. 393); for these are matters *collateral* to the charge.

"Be sure to tell the truth" (*R. v. Court*, 7 C. & P. 486); "You had better, as good boys, tell the truth" (*R. v. Reeve*, L. R. 1 C. C. R. 362); "Don't run your soul into more sin, but tell the truth" (*R. v. Sleeman*, Dears. 249); for these are mere admonitions on *moral or religious* grounds.

"I must know more about it" (*R. v. Reason*, 12 Cox 228); "You would not have told so many falsehoods had you not been concerned in it. Did any one induce you to do it?" (*R. v. Thornton*, 1 Lew. 49),—for *no promise or threat is imported*.

"What you say will be used as evidence against you," or for or against you" (*R. v. Baldry*, 2 Den. 430, overruling several earlier cases; *R. v. Lang*, 142 Sess. Pap. C. C. C. 1427-8), for such language imports a mere *caution*.

Inadmissible.

(a) A., a maid-servant, being charged with setting fire to her master's house, makes a confession in consequence of an inducement held out by her mistress:—the confession is inadmissible, for the mistress is a person in authority, the offence relating to her husband's property (*R. v. Upchurch*, 1 Moo. C. C. 465).

(b) Confessions induced by the following, from persons in authority, have been excluded:—

"It is no use to deny it, for there are the man and boy who will swear they saw you do it" (*R. v. Mills*, 6 C. & P. 146); "I dare say you had a hand in it; you may as well tell me all about it" (*R. v. Croydon*, 2 Cox 67); "The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth" [*R. v. Fennell*, 7 Q. B. D. 147. "The words 'you had better' seem to have acquired a sort of technical meaning," *per Kelly, C.B.*, in *R. v. Jarvis*, L. R. 1 C. C. R. 96]; "It would have been better if you had told at first" (*R. v. Walkley*, 6 C. & P. 175).

"If you tell me where my goods are, I will be favourable to you" (*R. v. Cass*, 1 Lea. 293, *note*). A servant in the custody of a constable said to her mistress, "If you forgive me, I will tell the truth;" the mistress replied, "Anne, did you do it?" (*R. v. Mansfield*, 14 Cox 639). "Tell me what you know about it; if you will not, of course we can do nothing for you" (*R. v. Partridge*, 7 C. & P. 551). "I only want my money, if you give me that, you may go to

Admissible.

In the following cases the effect of the original inducement was held to have been removed and the confession to be admissible :—

A constable having told a prisoner that it would be "better to confess," the magistrate on the following morning, before the prisoner made any statement, cautioned him "to say nothing against himself;"—a confession subsequently made held admissible (*R. v. Lingate*, 1 Phil. Ev. 10th ed. 414; *R. v. Bate*, 11 Cox 686).

So, where a constable had made a similar remark to the prisoner, and the latter afterwards asked the magistrate if this was so?—to which the magistrate replied that he would not say that it was (*R. v. Rosier*, 1 Phil. Ev. 10th ed. 414).

(c) A. is charged with burglary. The fact that, after an improper inducement, A. confessed to having thrown a lantern into a pond, and the fact that the lantern was found there, are admissible (*R. v. Gould*, 9 C. & P. 364; *R. v. Harris*, and *R. v. Thurtell*, cited Joy, 83-84. *Aliter* as to other parts of the confession).

Inadmissible.

the devil!" (*R. v. Jones*, R. & R. 152).

In the following cases the effect of the original inducement was held not to have been removed and the confession to be inadmissible :—

A constable told a prisoner in the morning that it would be "better to tell the truth;" in the evening another constable cautioned the prisoner that "anything he might say would be used against him." A confession afterwards made held inadmissible [*R. v. Doherty*, 13 Cox 23; *contra*, *Tay. s. 878*, citing several earlier cases].—A magistrate having told a prisoner that if the latter would confess he would do all he could for him, the prisoner subsequently confessed to a turnkey who did not caution him. Confession held inadmissible [*R. v. Cooper*, 5 C. & P. 535. It would probably have been inadmissible even if the turnkey had cautioned him.]

(c) A. is charged with theft. The fact that, after an improper inducement, A. confessed to the theft; and the fact that he took a constable to a house where, and to persons to whom, he said he had disposed of the property, which persons, however, denied the receipt of the property which was never found, both held inadmissible (*R. v. Jenkins*, R. & R. 492).

CHAPTER XVIII.

STATEMENTS BY DECEASED PERSONS.

[276-277.]

THE second main class of exceptions to the hearsay rule consists of the declarations of persons since deceased, which are admissible in proof of the facts declared in the under-mentioned cases, the truth of the declarations being deemed to be *primâ facie* guaranteed by the special conditions of admissibility imposed :

- (1) Declarations against interest.
- (2) Declarations in the course of duty.
- (3) Declarations as to public rights.
- (4) Declarations as to pedigree.
- (5) Dying declarations in cases of homicide.
- (6) Declarations by testators as to their wills.

[In (1) and (2) the declarations are admissible upon any issue; in (3) to (5) they are only admitted from necessity, and in proof of the particular issues named; in (6) they are admitted upon special grounds.]

Proof of Death, Identity, and Handwriting.—The special conditions of admissibility must be proved *aliunde* to the satisfaction of the judge; though after seven years' unexplained absence the death of the declarant may be presumed (*Wills v. Palmer*, 53 W. R. 169; *post*, 204), and in the case of documents, after thirty years, the death and generally the handwriting of the writer (*Wynne v. Tyrwhitt*, 4 B. & Ald. 376; *Doc v. Michael*, 17 Q. B. 276).

Competency and Credibility.—Sir J. Stephen states that the credit of a deceased declarant may be impeached or confirmed in the same manner as that of a *witness* who has denied on cross-examination the truth of the matter suggested (art. 135). This, however, is not altogether correct, for although incompetency excludes a dying declaration (*R. v. Drummond*, 1 Lea. 338), it does not exclude a declaration against interest (*Gleadow v. Atkin*, 1 C. & M. 410). And though previous inconsistent statements are admissible to discredit a living witness, they have been rejected to discredit the attestation of a document by a deceased one (*Stobart v. Dryden*, *ante*, 61), as also in disparagement of declarations made in the course of duty (*Stapylton v. Clough*, 2 E. & B. 933; *post*, 88).

Miscellaneous.—The declarations may be either oral or written; they are receivable either for or against the parties; and they are not rendered inadmissible by the existence of better evidence of the same facts.

DECLARATIONS AGAINST INTEREST.—Declarations, oral or written, made by deceased persons consciously against their pecuniary or proprietary interests, are admissible in proof of the facts stated [278-286].

Principle.—The grounds of reception are (1) *death*; and (2) the presumption that what a man states *against his interest* is probably true.

The Interest (a).—The interest must be *pecuniary or proprietary*; no other, even though of a *penal*, kind will suffice (*Sussex Peerage*, 11 C. & F. 108). Thus, entries in books of account are against the declarant's interest if they either acknowledge the payment of money due to himself, or charge him with the receipt of money for which he is accountable to a third person (*Tay. s. 673*). But the declarations must have been against interest *at the time* they were made; it is not enough that they might possibly turn out to be so afterwards (*Exp. Edwards*, 14 Q. B. D. 415).

Proprietary Interest.—So, declarations made by deceased persons in disparagement of their title to land

are admissible if made while the declarant was in possession of the property and as to matters within his personal knowledge or belief (*Trimbletown v. Kemmis*, 9 C. & F. 780). And as, in the absence of other proof, mere possession implies seisin in fee, any declaration by an occupier tending to cut down, charge, or fetter his presumably absolute interest, will be receivable under this head. A distinction, however, exists between statements which limit the declarant's own title, and those which go to abridge or encumber the estate itself; the former being admissible even between strangers, the latter being only so as against the declarant and his privies (*Papendick v. Bridgwater*, 5 E. & B. 166). [*Cp.* admissions by predecessors in title, *ante*, 67.]

Statutes of Limitation.—An acknowledgment made by (or by the direction of) a deceased creditor of money received on account of a debt or interest due to him is receivable as a declaration against interest if made *before*, but *not after*, the debt has become statute-barred (*Briggs v. Wilson*, 5 De G. M. & G. 12). If, however, such acknowledgment be merely *indorsed* upon the instrument itself, this will not be sufficient proof of such payment to defeat the statute, in cases of *simple contract debts* (9 Geo. IV. c. 14, s. 3).

Collateral Facts (b).—The declarations are evidence not only of the precise fact against interest, but of all *connected facts* (though not against interest) which are necessary to explain, or are expressly referred to by, the declaration—and whether contained in the same or other documents. Thus, accounts are admissible, some items of which charge the declarant, though other connected items discharge him, or even show a balance in his favour, for it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter case the debit items would still be against interest, since they diminish the balance in his favour; but *disconnected facts*, though contained in the same document or statement, are inadmissible (*Taylor v. Witham*, *post*, 87; *The Swiftsure*, 82 L. T. 389; Tay. s. 674).

Personal Knowledge. Competency, &c.—The declarations have been admitted, though the declarant had no personal knowledge of the facts, but received them merely on hearsay (*Percival v. Nanson, infra; Crease v. Barrett, post, 86; Tay. s. 669; contra, Lloyd v. Powell, &c. Co., 1913, 2 K. B. 130, 137, C. A.,* where however the above cases were not cited); though he had a motive to misstate them (*Taylor v. Witham, supra*); though he himself would have been incompetent as a witness (*Gleadow v. Atkin, 1 C. & M. 410*); and though they were not contemporaneous with the facts (*Doe v. Turford, 3 B. & Ad. 890*);—these matters affect weight, not admissibility. The declarations cannot, however, be used to derogate from the declarant's own grant (*Lalor v. Lalor, 4 L. R. I. 678*).

EXAMPLES.

Admissible

(a) An entry made by a deceased accoucher in his own books of the payment of his charges for attending a confinement, is evidence of the date of the child's birth (*Higham v. Ridgway, 10 East 109*); the name of its parents, though only stated on hearsay (*Percival v. Nanson, 7 Ex. 1*); and of the payment of the charges, though the payer was alive, and might have been called (*Middleton v. Melton, 10 B. & C. 317*).

To prove that A. (deceased) was illegitimate;—a statement by him that he was so, held receivable as against pecuniary and proprietary interest (*Re Perton, 53 L. T. 707; cp. ante, 65; and post, 95*).

To prove that A. owned certain land;—a statement of that fact made by B. (deceased) while felling timber on the land, is admissible; such act being a sufficient assertion of ownership to imply seisin in B., and so to admit his declarations in deroga-

Inadmissible.

(a) To prove a contract by A. to hire B. as a servant;—an entry in the diary of A. (deceased) as follows: "April 4th.—B. came as a servant; to have for the half year £2;" is not admissible as a statement against A.'s interest, since the agreement could not be presumed to be prejudicial to either party (*R. v. Worth, 4 Q. B. 132; post, 88*).

To prove the terms on which A. sent goods to B.; a letter written to B. by his deceased manager, stating that A. had sent the goods to the office on the terms in question, is not admissible;—the possible liability of B.'s manager to an action for damages in case the goods were lost being too remote a pecuniary detriment (*Smith v. Blakey, L. R. 2 Q. B. 326; ante, 19; post, 89*).

An admission of debt in a bankrupt's statement of affairs, is not a declaration against interest at the time, though there might turn out to be a surplus after payment of the creditors,

Admissible.

tion of his apparent title (*Doe v. Arkwright*, 5 C. & P. 575).

To prove the existence and terms of a (lost) lease;—an entry made in a rent-book by a deceased landlord that he had "agreed to grant a lease for thirty-one years at £96 rent, and accept the old rent (£84) for one year in consequence of the potato famine;"—held admissible as against *pecuniary* interest because of the abatement of the first year's rent, although the entry proved an increase in the new rent; and admissible against *proprietary* interest because the agreement to grant a lease tended to fetter the landlord's absolute right of ownership (*Connor v. Fitzgerald*, 11 L. R. Ir. 106).

A statement by a deceased occupier of land that he held a life-estate in it under a particular will of which C. and B. were executors;—is admissible to prove the existence and executors of the will (lost), being against proprietary interest on account of its twofold limitation of the declarant's estate to a life-interest, and under a particular document (*Sly v. Sly*, 2 P. D. 91; *post*, 89, 166).

(b) To prove a loan of money by A. to B.;—an entry by A.

Inadmissible.

which would be diminished by the amount admitted (*Exp. Edwards*, 14 Q. B. D. 415).

To prove the marriage of A. and B.;—a statement by a deceased clergyman that he had performed the ceremony, the circumstances being such as to render him liable to a criminal prosecution, held inadmissible, not being against "pecuniary or proprietary" interest (*Sussex Peerage*, 11 C. & F. 103-114).

To prove that a certain spot was not within the waste of a manor;—a declaration by a deceased lord that "he was entitled to the waste up to a certain point (which did not include the *locus in quo*), but no further," is inadmissible—(1) the lord not being in possession of the *locus*; (2) as not being against proprietary interest, because, though disclaiming as to one part, he affirmed as to the other [*Crease v. Barrett*, 1 C. M. & R. 919; *cp. ante*, 85].

A., a dependant of C., deceased, sues B. for injury to C., by an accident. B. tenders a statement by C. ascribing the injury to a whitlow. Held, C.'s statement was inadmissible, not being to C.'s knowledge against his interest, since no claim was then made or anticipated (*Tucker v. Oldbury U. D. C.*, 1912, 2 K. B. 317, C. A. It was also rejected as an admission, since A. did not claim through C.).

A statement by A. (deceased) promising to marry a woman and admitting the paternity of her unborn child;—held not against A.'s interest (*Lloyd v. Powell Co.*, 1913, 2 K. B. 130, C. A.).

(b) An account kept by the deceased steward of A., on one side

Admissible.

(deceased), "B. paid me three months' interest," followed by other entries connected therewith, and pointing to such a loan, are admissible, though forming the only evidence of the loan (*Taylor v. Witham*, 3 Ch. D. 605).

Inadmissible.

of which the steward debited himself with rents received for A., but on the opposite side credited himself with certain disbursements and the tenants with certain allowances;—held, inadmissible to prove the disbursements and allowances, the debit and credit items not being connected together by any specific reference [*Doe v. Bevis*, 7 C. B. 456; so, where the debit and credit items were merely connected by a balance struck, *Whaley v. Carlisle*, 15 W. R. 1183; 17 Ir. C. L. R. 792].

DECLARATIONS IN COURSE OF DUTY.—Declarations, oral or written, made by deceased persons in the ordinary course of duty, contemporaneously with the facts stated, and without motive to misrepresent, are admissible in proof of their contents [287-293].

Principle.—The grounds of reception are (1) *death*; and (2) the presumption of truth which arises from the mechanical and generally disinterested nature of entries made in the routine of *duty*, and their constant liability, if false, to be detected.

The Duty (a).—The declarations must have been made in the discharge of a duty to a *third person*; a mere personal custom, not involving responsibility, is insufficient (*R. v. Worth*, 4 Q. B. 132; *Massey v. Allen*, 13 Ch. D. 558). And the duty must not be a *general* one, involving a variety of acts that may change from time to time, but *specific and two-fold*—i.e., to do a particular act and to record or report it when done (*Smith v. Blakey*, L. R. 2 Q. B. 326), though a rigid enforcement of this condition would conflict with several of the cases in which the evidence has been received.

Contemporaneousness (b).—The declarations must have been made contemporaneously with the facts recorded (*Doc v. Turford*, 3 B. & Ad. 890; *Smith v. Blakey*, *supra*); which term, however, is not to be construed in the strict sense applicable to declarations that are a part of the *res gesta* (*ante*, 17); nor in the loose one applicable to entries in public registers, or memoranda to refresh the memory of a witness (*post*, 107, 148-9). The entry should be made at, or near, the time of the act—a record in the evening of an act done the same morning has been received (*Price v. Torrington*, 1 Salk. 285); while an interval of two days has sufficed to exclude (*The Henry Coxon*, *infra*).

Collateral Facts, Personal Knowledge, Motive to Misstate, Contradiction (c).—The declarations, unlike those against interest, are only evidence of the precise facts that it was the writer's duty to record, and of which consequently he had personal knowledge; and not of other matters which, though contained in the same statement, were merely collateral (*Chambers v. Bernasconi*, 1 C. M. & R. 347; *Smith v. Blakey*, *supra*); and a motive to misstate will exclude them (*The Henry Coxon*, 3 P. D. 156).

The entries cannot be contradicted or explained by subsequent declarations of the deceased (*Stapylton v. Clough*, 2 E. & B. 933; *cp. ante*, 83).

EXAMPLES.

Admissible.

(a) To prove that A. delivered certain beer to B.;—an entry of the delivery made in A.'s books at night by his drayman (deceased), whose duty it was to deliver the beer during the day, and afterwards to make the entry, is admissible (*Price v. Torrington*, 1 Salk. 285).

Entries made by a deceased surveyor in his field-book for the purpose, and at the time, of a survey on which he was professionally employed, held admissible as in the discharge of

Inadmissible.

(a) To prove the terms on which A., a farmer, hired B., a labourer;—a memorandum of the transaction, made at the time by A. (deceased) in his own books, and according to his usual custom, is inadmissible, there being merely a practice and not a duty to make the entries (*R. v. Worth*, *ante*, 85).

To prove the terms on which A. sent goods to B.;—a letter, stating the terms, and written by the deceased manager of the branch at which the goods were

Admissible.

professional duty (*Mellor v. Walmsley*, 1905, 2 Ch. 164, 167-8, C. A.).

To prove service of a notice to quit on A.'s tenant;—an indorsement of the fact and time of service made on a duplicate notice by a deceased clerk of A.'s solicitor, whose duty it was to serve the notice, is admissible; though not a subsequent oral declaration that he had served it on the wrong person [*Stapylton v. Clough*, 2 E. & B. 933]. It has been doubted whether the duty of a solicitor to his client is within the rule, but the great weight of authority is in the affirmative.

To prove the contents of A.'s lost will,—a copy thereof, made by a deceased clerk of the solicitor to the executor of the will, endorsed "A.'s will";—held admissible (*Sly v. Sly*, 2 P. D. 91; *ante*, 86; *post*, 166).

Entries made by a deceased surveyor in his field-book for the purposes and at the time of a survey on which he was employed (*Mellor v. Walmsley*, cited *supra*), together with his estimates and reports as to the cost of roads, made to road-trustees (*North Staff. Ry. v. Hanley*, 26 T. L. R. 20);—are evidence of the matters contained. *Aliter*, perhaps, if the reports consist mainly of matters of opinion (*Re Djambi Estates*, 107 L. T. 631, C. A.).

Inadmissible.

received, in pursuance of a duty to keep his principal informed of all business done at that branch, is not admissible, the manager's duty being a general and not a specific one (*Smith v. Blakey*, L. R. 2 Q. B. 326; *ante*, 19, 85).

To prove the purchase of shares for a client;—an entry made by a deceased stockbroker in his day-book that he had bought the shares for the client, is inadmissible, there being no duty to make the entries (*Massey v. Allen*, 13 Ch. D. 558).

(b) & (c) The question being which of two ships was to blame for a collision occurring on a certain Saturday;—an entry of the circumstances of the collision made by a deceased mate in the ship's log on the following Monday—held inadmissible—

(1) The acts recorded having been done by third persons and not by the deceased; (2) the entries not being contemporaneous; and (3) it being in the interest of the declarant to represent the collision as occurring through the fault of the other ship (*The Henry Coxon*, 3 P. D. 156).

The question being whether A. was arrested in a certain parish;—a certificate annexed to the writ by a deceased sheriff's officer stating the fact, time, and place of the arrest, returned by him to the sheriff, held inadmissible, on the ground that the duty merely required the fact and time, but not the place, of the arrest to be returned (*Chambers v. Bernasconi*, 1 C. M. & R. 347; *cp. post*, 111).

DECLARATIONS AS TO PUBLIC RIGHTS.—

Declarations by deceased persons of competent

knowledge, made *ante litem motam*, are admissible in proof of ancient rights of a public or general nature [294-306].

Principle.—The grounds of admission are (1) *death*; (2) *necessity*, ancient facts being generally incapable of direct proof; and (3) the guarantee of truth afforded by the *public nature of the rights*, which tends to preclude individual bias, and lessen the danger of misstatements by exposing them to constant contradiction. Evidence of this kind is often loosely referred to as *Reputation* (*post*, 116).

What are matters of Public and General Interest (a).—The right or interest involved must be of a pecuniary or proprietary nature (*R. v. Bedfordshire*, 4 E. & B. 535; *cp. ante*, 83). *Public Rights* are those common to all members of the State—*c.g.*, rights of highway and ferry, or of fishery in tidal rivers. *General Rights* are those affecting any considerable section of the community—*c.g.*, questions as to the boundaries of a parish or manor.

Declarations by deceased persons as to *private* rights are inadmissible, since these are not likely to be so commonly or correctly known, and are more liable to be misrepresented. Where, however, the question is, whether a right is public or private (*R. v. Bliss*, 7 A. & E. 550); or the private right is identical with a public one (*Thomas v. Jenkins*, 6 A. & E. 525), such declarations are receivable.

Competent Knowledge (b).—In the case of *public rights*, all being concerned are presumed competent; so that the absence of peculiar means of knowledge goes, strictly speaking, to weight and not admissibility. But in the case of *general rights*, competency must be shown extrinsically (*Crease v. Barrett*, 1 C. M. & R. 928-9), *e.g.*, by their connection with the locality, or by the circumstances under which the declarations were made (*Freeman v. Phillipps*, 4 M. & S. 486).

Lis Mota and Interest (c).—To prevent bias, the declarations must have been made *ante litem motam*—

i.e., before the commencement of any controversy, not merely legal but actual, involving the same subject-matter. Declarations made after such a dispute has arisen are inadmissible, although the dispute was *unknown* to the declarant (*Berkeley Peerage*, 4 Camp. 417); or was *fraudulently commenced* with a view to excluding the declarations (*Shedden v. A.-G.*, 30 L. J. P. 217).

On the other hand, declarations as to the right will be received though made for the express purpose of *preventing future disputes* (*Berkeley Peerage*, *supra*); or after a *claim had been asserted, but finally abandoned* (Hubb. Ev. of Suc. 668); or after the existence of *non-contentious legal proceedings* involving the same right (*Brisco v. Lomax*, 8 A. & E. 198); or after the existence of *contentious legal proceedings* involving the same right only *collaterally* and not directly (*Freeman v. Philipps*, *supra*).

Interest.—Declarations made in direct support of a claim contemplated to be brought by the declarant, or otherwise obviously to subserve his own interest, will be rejected (*Brocklebank v. Thompson*, 1903, 2 Ch. 351-3; *cp. post*, 96, 97); but if no dispute has arisen, or claim been contemplated, the facts that the declarations tend to support his own title, or that the declarant stood, or believed he stood, in *pari jure* with the party relying on them, affect only weight, not admissibility (*Doe v. Davies*, 10 Q. B. 314).

Particular Facts (*d*). **Corroboration**.—The declarations must relate to the general right, and not to particular facts which support or negative it; for the latter, not being equally notorious, are liable to be misrepresented or misunderstood, and may have been connected with other facts which, if known, would qualify or explain them.

Declarations have been received, however, which not only directly negative a general right, but which indirectly do so—*e.g.*, by setting up an inconsistent private claim, or by omitting all mention of it where mention might reasonably be expected (Tay. s. 620).

Corroboration.—It is not essential to admissibility,

though it is to weight, that the declarations should be corroborated by proof of the exercise of the right within living memory (*Crease v. Barrett*, 1 C. M. & R. 919).

Form of the Declarations.—The declarations may have been made in the form of *oral statements*; *depositions* in former suits; old *deeds and leases* (copies, though admissible as secondary evidence, are not receivable *per se*, the contents of documents being in the nature of a particular fact and so not provable by reputation: *Doe v. Whitcomb*, 6 Ex. 601); private *maps* if made by, or under the direction, or from the information of, deceased persons of competent knowledge (*Smith v. Lister*, 72 L. T. 20; *Mercer v. Denne*, 1905, 2 Ch. 561, 568; *A.-G. v. Horner*, 1913, 2 Ch. 140, 153-6); or used by such persons to define the general right and not merely particular matters (*Smith v. Lister*, *supra*); and ancient, but *qu.* modern, *public surveys* made under competent public authority (*Freeman v. Read*, 4 B. & S. 174).

Manor Books and *Presentments* are also sometimes received under this head (*Roe v. Parker*, 5 T. R. 31-2), though more often as public documents (*post*, 109) or acts of ownership (*ante*, 27); as also are *Verdicts and Judgments*, though not mere *Awards* or unprosecuted *claims*.

EXAMPLES.

Admissible.

(a) The following have been held to be matters of *public or general interest* :—

Questions as to the boundaries of a county, town, parish, manor or hamlet (*Nicholls v. Parker*, 14 East 331 n.).

The question whether a certain road was a public highway or not (*R. v. Bliss*, 7 A. & E. 550; *R. v. Berger*, 1894, 1 Q. B. p. 827).

Inadmissible.

(a) The following have been held to be matters of a *private nature* :—

Questions as to the boundaries of two private estates (*Clothier v. Chapman*, 14 East 331 n.); or of a waste over which some tenants only of a manor claimed a right of common (*Dunraven v. Llewellyn*, 15 Q. B. 791); or of a highway, on a charge against an adjoining landowner of obstruction [*R. v. Berger*, *opposite*; here the question was not whether the land obstructed was a highway or not, but whether it formed part of an admitted

Admissible.

A custom of electing the churchwardens of a parish (*Berry v. Banner*, Pea. R. 156).

(b) To prove a custom of a manor;—declarations by deceased tenants of, or even mere residents in, the manor are admissible (*Dunraven v. Llewellyn*, 15 Q. B. 791).—So, to prove a custom of mining, declarations by deceased owners of the surface, for though they had no interest in the mines they were more likely to become adventurers than those at a distance (*Crease v. Barrett*, *supra*).

So, competent knowledge will be presumed from the declarants having been called as witnesses in an ancient suit (*Freeman v. Phillipps*, 4 M. & S. 486); or becoming parties to an Inclosure Act (*Carnarvon v. Villebois*, 13 M. & W. 313).

(c) The question being as to the boundaries between two manors;—a verdict in former *non-contentious* proceedings on the joint petition of previous owners of the two manors alleging that disputes as to the boundary were likely to arise, is admissible (*Brisco v. Lomar*, 8 A. & E. 198; *Gee v. Ward*, 7 E. & B. 509). So, to prove the mode of assessment of a customary fine;—depositions in an ancient suit against a former lord, in which only the *amount* of the fine, and not its mode of assessment, was in question, are admissible, the *lis mota* being different (*Freeman v. Phillipps*, 4 M. & S. 486).

(d) The question being whether a road was public or private;—declarations by deceased resi-

Inadmissible.

highway, or was the private property of the defendant].

A custom of electing the master of a grammar school (*Withnell v. Gartham*, 1 Esp. 322).

(b) The question being as to the boundaries of a county;—declarations by deceased law officers and dignitaries of the Crown, who had no personal knowledge of the subject except what they derived from an irregular judicial inquiry, are inadmissible (*Rogers v. Wood*, 2 B. & Ad. 245).

(c) The question being as to a right of common in a manor;—declarations as to the right made by deceased manor tenants during a former (although irregular) inquiry, as to the same right, are inadmissible, being *post litem motam* (*Richards v. Bassett*, 10 B. & C. 657).

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(d) The question being whether a road was public or private;—declarations by a

Admissible.

dents in the neighbourhood that it was public (*Crease v. Barrett*, 1 C. M. & R. 928-9); or private (*Drinkwater v. Porter*, 7 C. & P. 181), are admissible.

To prove that the boundary of a town extended to a certain spot, declarations by deceased inhabitants that it extended thither are receivable (*Ireland v. Powell*, Pea. Ev. 16).

Inadmissible.

deceased resident in the neighbourhood that he had seen repairs done upon it (*R. v. Bliss*, 7 A. & E. 550); or proof that he had planted a tree near the road, stating, at the time, that he did it to show where the boundary had been when he was a boy (*ibid.*);—are inadmissible as relating to particular facts.

To prove that a town extended to a certain spot, declarations by deceased inhabitants that houses formerly stood at that spot, are inadmissible (*Ireland v. Powell*, *opposite*).

DECLARATIONS AS TO PEDIGREE.—Declarations made by deceased relatives, *ante litem motam*, are admissible to prove matters of pedigree [307-317].

Principle.—The grounds of reception are (1) *death*; (2) *necessity*, such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof; and (3) the *peculiar means of knowledge and absence of interest to misrepresent* of the declarants—members of the family having the greatest interest in seeking, the best opportunities of obtaining, and the least motives for falsifying, information on such subjects (Tay. s. 635).

What are matters of Pedigree (a).—The declarations are only receivable when the facts involved are required to be proved for some *genealogical purpose*, i.e., when the pedigree to which they relate is in issue, and not merely relevant to the issue (Steph. art. 31).

The term “matter of pedigree” is thus confined primarily, to issues involving *family succession* (testate or intestate), *relationship*, and *legitimacy*; and secondly, to such particular incidents of family history as are immediately connected with, and required for the proof of, such issues—*c.g.*, the *birth*, *marriage*, and *death* of

members of the family, with the respective *dates* and *places* of those events; their *celibacy*, *issue* or *failure of issue*; as well, probably, as *occupation*, *residence*, and similar incidents of domestic history necessary to identify them.

On the other hand, when such incidents, although inferentially tending to prove, are not immediately connected with, the question of pedigree (Tay. s. 644); or when they are not required for some genealogical purpose (*Haines v. Guthrie*, 13 Q. B. D. 818), they will be rejected.

Declarants must have been Blood Relations or their Consorts.—The declarations are only receivable from persons who were legitimately connected by blood with the family in question, or from their husbands or wives (whether the marriage was subsisting or not); and not from mere relatives of the latter (*Shrewsbury Peerage*, 7 H. L. C. p. 23); nor from friends, servants, or neighbours of the family (*Johnson v. Lawson*, 2 Bing. 86). Moreover it seems doubtful whether the *legitimate* members of a family may, by their declarations, impeach the legitimacy of their reputed relations, since the latter, though *de facto* related, would be *de jure* strangers (*Crispin v. Doglioni*, 32 L. J. P. & M. 109; *Plant v. Taylor*, 7 H. & N. 211); declarations, however, operating indirectly to this effect, *e.g.*, by impeaching the validity of the marriage, or stating the birth to have preceded it, are receivable (*Murray v. Milner*, 12 Ch. D. 849; *Re Turner*, 29 *ibid.* 985). Declarations by deceased *illegitimates* are wholly inadmissible, for a bastard being *filius nullius* can have no relations (*Doe v. Barton*, 2 M. & R. 28; *Doe v. Davies*, 10 Q. B. 314); though if confined to his *own* illegitimacy they may be evidence as admissions, or as statements against interest (*Re Perton*, *ante*, 65, 85).

Competent Knowledge. Hearsay upon Hearsay. Contemporaneousness (*b*).—It is not necessary that the declarant should have had personal knowledge of the facts stated; it is sufficient if his information purported to have been derived from other relatives, or general family repute, or even “what he has heard,” provided

such "hearsay upon hearsay" does not directly appear to have been derived from strangers (*Sheddon v. A.-G.*, 30 L. J. P. & M. 217; *Davies v. Loundes*, 6 M. & G. p. 527). Nor need the declarations refer to contemporaneous events; statements as to matters occurring many generations before have been received (*Davies v. Loundes*, *supra*).

Lis Mota and Interest (c).—The declarations are inadmissible if made *post litem motam* (*ante*, 90), or obviously to subserve interest (*Plant v. Taylor*, 7 H. & N. 211).

Form of the Declarations.—The declarations may be in the form of *oral statements*; *family correspondence*; recitals or descriptions in *Settlements and Wills* (even if cancelled or invalid, provided that in the case of wills the original is produced, probate being here secondary evidence only: *post*, 164); entries in *Almanacs and Prayer-books*; or inscriptions on *tombstones, coffin-plates, rings, portraits*, and the like, which if proved to have been made by a deceased relation, will be received as *his* declarations, but if publicly exhibited, will be admitted on the presumption of family acknowledgment, though their authors be alive (*Tay. s.* 652).

Family Bibles stand upon a somewhat different footing, not because of the sacred nature of the volume, but from the custom of using it as a family register. Entries therein are receivable on the grounds of publicity and family acknowledgment, without proof of identity, relationship, or (presumably) death (*Hubbard v. Lees*, L. R. 1 Ex. 255). *Family repute and conduct*, or even in some cases the repute and conduct of strangers, are also admissible (*ante*, 30); as well as old *Answers in Chancery* provided the pedigree facts were not in dispute, but merely incidentally mentioned (*Lyell v. Kennedy*, 14 App. Cas. 437).

EXAMPLES.

Admissible.

(a) B. claims freehold property as heir-at-law to A.;—the death of A. and of any of his

Inadmissible.

(a) A. as reversioner, sues B. who, as tenant *pour autre vie* had held over after the death of

Admissible.

relations entitled in priority to B., may be proved by family repute as matters of pedigree (*Doe v. Griffin*, 15 East 293). The same proof is admissible on an application by B. to administer the personal estate of A. (*Re Thompson*, 12 P. D. 100).—So, where A. had devised lands to his son B. for life, then to B.'s sons, C., D. and E. in succession; in an action by E. to recover the lands, the deaths of B., C. and D., may be similarly proved (*Palmer v. Palmer*, 18 L. R. Ir. 192).

(b) To prove the descent of A.;—a pedigree in the handwriting of one of A.'s ancestors, purporting to be derived *partly* from personal knowledge and the information of other deceased relations, held admissible as to such part (*Davies v. Lowndes*, 6 M. & G. 522-9). So, a declaration by A. (deceased) as to his own age or birthplace, is admissible, provided the matter be one of pedigree, though such statements are necessarily founded on hearsay (*Sturlav. Freccia*, 5 App. Cas. 641).

(c) In an action by B. to recover land as heir-at-law to A.;—an affidavit stating B.'s relationship to A. and made by a deceased relative in a previous non-contentious proceeding in Chancery, in which an inquiry was directed as to who was A.'s heir and next-of-kin, held admissible, such a proceeding not constituting a *lis mota* (*Gee v. Ward*, 7 E. & B. 509).

Inadmissible.

C., the *cestui que vie*, for use and occupation. The death of C. cannot be proved by the declarations of deceased relatives, not being a matter of pedigree (*Whittuck v. Waters*, 4 C. & P. 375).

A. sues B. for goods sold, to which B. pleads infancy;—B.'s age cannot be proved by an affidavit of the infant's deceased father made in a previous Chancery action to which the plaintiff was not a party (*Haines v. Guthrie*, 13 Q. B. D. 818).

Inquiries as to the birth settlement of a pauper (*R. v. Erith*, 8 East 539); or the age of the deceased in an action on a life policy (*Splents v. Lefevre*, 11 L. T. N. S. 117) are not questions of pedigree.

(b) To prove the descent of A.;—a pedigree in the handwriting of one of A.'s ancestors, purporting to be derived *partly* from "parish registers, wills, monumental inscriptions, family history and records" (not shown to be lost), held inadmissible as to such part (*Davies v. Lowndes*, *opposite*).

To prove A.'s age: a report by a Government committee as to his fitness for a consulship, which report mentioned his age, is inadmissible (*post*, 111).

(c) The question being whether B. was the legitimate son of A. by his second wife, and proof having been given that A.'s first wife was alive at the time of his second marriage, a declaration by A. (deceased) that the husband of his first wife was living when A. married her, is inadmissible, as obviously in A.'s own interest (*Plant v. Taylor*, 7 H. & N. 211; *cp. Dysart Peerage*, 6 App. Cas. 497-503).

DYING DECLARATIONS AS TO HOMICIDE.—

In trials for murder or manslaughter the dying declarations of the deceased, made under the sense of impending death, are admissible to prove the circumstances of the crime [318-323].

Principle.—The grounds of admission are (1) *death*; (2) *necessity*, for the victim being generally the only eye-witness to such crimes, the exclusion of his statement might defeat the ends of justice; and (3) the *sense of impending death*, which creates a sanction equal to the obligations of an oath.

Homicide of Declarant (a).—The declarations are not admissible upon charges other than *homicide*; or as to homicides other than that of *the declarant* (*R. v. Hind*, 8 Cox 300).

Condition at Time of Declaration (b).—And the deceased must be proved to the satisfaction of the judge to have been, at the time of making the declaration, in *actual danger of death*, and to have *abandoned all hope of recovery*. If these conditions concur, it is immaterial that he lingered for some days, or even weeks (*R. v. Bernadotti*, 11 Cox 316), or subsequently entertained hope (*R. v. Hubbard*, 14 Cox 565). There must, however, have existed a “settled, hopeless, expectation of death,” not qualified by any prospect of recovery, however slight; and the weight of authority requires a belief, not, indeed, in an immediate death, but in an impending and imminent, as distinguished from a deferred, one (*R. v. Perry*, 1909, 2 K. B. 697).

The declarant’s mental condition may be inferred from his own statements at the time; his conduct (as in taking leave of his friends, giving directions for his funeral, receiving extreme unction, &c.); the opinions of medical or other attendants expressed to him; the serious nature of the injury received, and other attendant circumstances.

Competency and Credibility.—The declarant must have been competent as a witness; thus, imbecility or tender age will exclude the declaration (*R. v. Drum-*

mond, 1 Leach C. C. 338). And his credibility may, perhaps, be impeached in the same manner as that of a witness (*ibid*; see *ante*, 83).

Subject and Form, &c., of the Declarations.—The declarations are only admissible to prove the *cause of, and circumstances of the transaction resulting in, death*, and not *previous or subsequent transactions*, although relevant to the issue (*R. v. Mead*, 2 B. & C. 605). Nor may they include hearsay, or irrelevant matter (*Tay. s. 720*); though opinions have been received (*R. v. Scaife, infra*). They are not, however, incompetent, through being made in response to leading questions (*R. v. Smith*, 10 Cox 82), or taken as depositions and proving invalid as such (*R. v. Woodcock*, 1 East P. C. 356).

EXAMPLES.

Admissible.

(a) A. is charged with the murder of B.;—a dying declaration by B. that A. had murdered him is admissible against A. (*R. v. Mosley*, 1 Moo. 97); and one that "I don't think A. would have struck me if I hadn't provoked him," is admissible in A.'s favour (*R. v. Scaife*, 1 Moo. & Rob. 551).

(b) Declarations have been received after proof of the following expressions by the deceased:—

"Be quick, or I shall die" (*R. v. Bernadotti*, 11 Cox 316). "I am dying, look to my children" (*R. v. Goddard*, 15 Cox 7). "I have seen the surgeon to-day and he has given me some little hope that I am better; but I do not myself believe that I shall ultimately recover . . . I cannot recover." [*R. v. Reaney*, 7 Cox 209. In this case much stress was laid on the word "ultimately" as a reason for rejecting the declaration; but it was held that it did not, under the circumstances, import a belief

Inadmissible.

(a) A. is charged with the murder of B.;—a dying declaration by C. that he and not A. had murdered B., is inadmissible (*R. v. Gray, ante*, 61, 79).

A. is charged with robbing B.;—a dying declaration by B. as to the circumstances of the robbery is inadmissible (*R. v. Lloyd*, 4 C. & P. 233).

(b) Declarations have been rejected after proof of the following expressions by the deceased:—

"I think myself in great danger" (*R. v. Errington*, 2 Lew. C. C. 148). "I think I shall not recover, as I am very ill" (*R. v. Spilsbury*, 7 C. & P. 187). "I hope I shall get well, but do not think so. I give the following directions in case I die" (*R. v. Gloster*, 16 Cox 471; *ante*, 19). "I have no hope of recovering, unless it be the will of God" (*R. v. Murphy*, 1 Ar. M. & O. 206).

The deceased, having made a statement, which was taken down in writing by a third person, concluded, "I make the

Admissible.

in a deferred, as opposed to an impending, death.]

The deceased himself had no hope of recovery, though his doctor had a hope and had expressed it to him. Declaration admitted (*R. v. Mosley*, 1 Moo. 97; *R. v. Peel*, 2 F. & F. 21).

Inadmissible.

above statement with the fear of death before me, and with no hope of recovery." Afterwards, on the statement being read over to her, she altered it to, "with no hope at present of my recovery." Declaration rejected (*R. v. Jenkins*, L. R. 1 C. C. R. 187).

DECLARATIONS BY TESTATORS.—On questions involving the *factum*, contents, or interpretation of a will, the declarations of the deceased testator are admissible, not as evidence of the *truth* of the matters asserted, but to show his state of mind at the time [324-334].

Principle.—The declarations included under this head are treated in the present connection for convenience, and because they have sometimes been regarded as forming an exception to the hearsay rule on account of the (1) *death*, (2) *peculiar means of knowledge*, and (3) *absence of interest to misrepresent* of the declarant [*Ros. N. P.* 55; *Steph. art.* 29, on the authority of *Sugden v. St. Leonards*, *infra*]. This, however, is incorrect, and it is to be observed that in no other case will mere *absence* of interest, though coupled with special means of knowledge, suffice to admit the declarations of deceased persons as exceptions to the rule.

Admissible as Original Evidence; Inadmissible as Hearsay.—When, as most commonly happens, such declarations are tendered not to prove the truth of the facts stated, but to show the knowledge, intention, sanity, or other mental state of the testator, it is misleading to consider them as exceptions to the hearsay rule. Their admissibility does not depend on all, or any, of the conditions above mentioned. They are original evidence receivable either (1) as part of the *res gesta* (*Johnson v. Lyford*, L. R. 1 P. & D. 546), in which case they must have been made contemporaneously with the testamentary act (*ante*, 17); or, more

usually in this connection, (2) as presumptive evidence of the mental condition which they manifest (*ante*, 18), in which case it is, in general, immaterial to admissibility as distinguished from weight, whether they were made before, at, or after such act, or whether in form they expressed a future intent, or asserted a past fact (*cp. Keen v. Keen, post*, 103).

On the other hand, declarations by testators, when tendered to prove the testamentary facts asserted, *e.g.*, the execution, or revocation, of the will, or the date of alterations therein, have, with the well-known exception mentioned below, been uniformly excluded as hearsay (*Doe v. Palmer*, 16 Q. B. 747; *Atkinson v. Morris*, 1897, P. 40, C. A.). In *Sugden v. St. Leonards*, 1 P. D. 154, however, the majority of the C. A. held that *post*-testamentary declarations were admissible to prove the contents of a lost will, as exceptions to the hearsay rule, *i.e.*, as statements by a deceased person with peculiar means of knowledge, and without interest to misrepresent. This ruling, which was dissented from by Mellish, L.J., and subsequently doubted in *Woodward v. Goulstone*, 11 App. Cas. 469, and by the C. A. in *Atkinson v. Morris, supra*, seems contrary to principle; though it is conceived that had such declarations been tendered, not as direct hearsay proof of the contents of the will, but merely as original evidence of a continuing intention on the part of the testator, *i.e.*, of his intent remaining the same *after*, as *before*, its execution (see *Gould v. Lakes, infra* 103), they might have been received. *Sugden v. St. Leonards* has been criticized by Prof. Thayer as a case "remarkable for many ill-considered dicta as to the hearsay exceptions and the rules of evidence in general" (2 Harv. Law Rev. 94).

Factum of Will: Execution, Identity, Validity, Revocation (a).—Declarations of intention, either before, at, or after the execution, are admissible as original evidence to support or rebut the inference of due execution, arising from a partial compliance with the statute (*Clarke v. Clarke*, 5 L. R. Ir. 47), to *identify* the will or its constituent papers (*Gould v. Lakes*, 6 P. D. 1), to show whether it was signed *animo testandi* (*Re Slinn*,

15 P. D. 156), or circumstantially to impeach its validity on the ground of fraud, etc. (*Doe v. Hardy*, 1 M. & R. 525). They are also receivable to show whether the destruction of a will was done *animo revocandi* (*Giles v. Warren*, L. R. 2 P. & D. 401), as well as to rebut, or in reply to support, the presumption of destruction *animo revocandi* arising from the will not being forthcoming at death (*Keen v. Keen*, L. R. 3 P. & D. 105). On the other hand, direct assertions by the testator that he has executed or revoked the will (*Atkinson v. Morris*, 1897, P. 40), or that it was invalid because obtained by fraud, etc. (*Provis v. Reed*, 5 Bing. 435) are inadmissible as hearsay.

Contents. Alterations and Mistakes (b).—Declarations by testators have, as we have seen, been received as secondary evidence of the contents of a lost will (*Sugden v. St. Leonards*, *ante*, 101; *post*, 104); and to rebut the presumption of law, that alterations in the will were made *after* execution (*Doe v. Palmer*, *supra*); while mere hearsay assertions by the testator to the same effect would be inadmissible (*ibid.*). And declarations showing the testator's ignorance of words mistakenly inserted in his will, are admissible on an application to strike out such words (*Morrell v. Morrell*, 7 P. D. 68; *post*, 180).

Interpretation.—The above two headings deal with declarations by testators admitted as original evidence or rejected as hearsay. Under the present head, a further distinction has to be observed between declarations which are *indirect* or *circumstantial* evidence of intention (*i.e.*, showing merely the state of the testator's knowledge, feelings, or habits of speech), and his *direct* statements of intention, the former being admissible, generally, in aid of interpretation, the latter being receivable only to *solve an equivocation* [*post*, 187-8, 194. As to the admission of direct declarations to *rebut a presumption*, see *post*, 205-6].

EXAMPLES.

Admissible.

(a) An attestation clause stated that the will was signed by A.

Inadmissible.

(a) Declarations by A. (deceased) that "she had executed

Admissible.

"in the presence of two witnesses." To prove that all three were present *together*, declarations by A. on his death-bed acknowledging the validity of the will, held admissible as presumptive evidence that, as he knew of and had complied with the other statutory formalities, he probably knew of and had complied with this one (*Clarke v. Clarke*, 5 L. R. I. 47, C. A.).

So, declarations by A. that he had burnt his will, are admissible, not as evidence of destruction, but to show an intent to destroy (*Keen v. Keen*, L. R. 3 P. & D. 105).

To prove that certain papers formed part of A.'s will;—declarations made by A. *before* executing the will that he intended to leave his property in a particular manner (which corresponded with the dispositions contained in those papers); and declarations *after* the execution that he had so left his property;—Held admissible. [*Gould v. Lakes*, 6 P. D. 1; the *post*-testamentary declarations were here expressly received "to show that A.'s mind continued in the same state after the will as before."]

A. propounds a will by B. in which B.'s property is left to A. C. contests the will as obtained by fraud. Declarations by B. before executing the will that he intended to leave his property to A. or to C. (respectively) would be admissible to support or impeach the will (*Doe v. Hardy*, 1 M. & R. 525).

(b) A devise by A. "to B. in fee," having been altered to "B. for life, then to C.";—declarations by A. *before* executing the

Inadmissible.

her will in duplicate and had destroyed one part with the intention of revoking it;"—held inadmissible, as hearsay, to prove either the execution of the duplicate, or its revocation by destruction (*Atkinson v. Morris*, 1897, P. 40, C. A.; *Keen v. Keen*, *opposite*).

A., under a devise from B., claims land held by C. as B.'s heir-at-law. C.'s defence is that B.'s will was not duly executed. Declarations by B. that "A. drew up a paper and got me to sign it—but it isn't valid. My land goes to C." are inadmissible as hearsay to prove those facts, although both A. and C. claim under B. (*Provis v. Reed*, 5 Bing. 435).

(b) The question being whether certain alterations appearing on the face of a will, were made before or after its execution;—

Admissible.

will that he "intended to provide for C."—are admissible to rebut the presumption that the alteration was made after execution (*Doe v. Palmer*, 16 Q. B. 747). So, to show that the deletion of a revocation clause in a second testamentary document was made *before* execution,—declaration by the testator *after* execution, treating the first will and its provisions as still subsisting, are admissible (*Re Tonge*, 66 L. T. 60).

To prove the contents of a lost will;—verbal instructions for the will given by the deceased testator; a draft authenticated by him; and declarations as to the provisions he was about to make in it :—Held admissible, in corroboration of a witness who had read the will, and as showing that the testator probably made the dispositions which his declarations showed he intended to make. Declarations *after* the execution of the will that his daughter would be wealthy and enjoy the same comforts as she was then doing, also held admissible as exceptions to the hearsay rule. [*Sugden v. St. Leonards*, 1 P. D. 154, C. A.; but see *ante*, 101, as to the second point.]

Inadmissible.

declarations by the testator *after* the execution, that they had been made before it, are inadmissible [*Doe v. Palmer*, *opposite*; *Re Hardy*, 30 L. J. P. 142].

CHAPTER XIX.

STATEMENTS IN PUBLIC DOCUMENTS.

[335-338.]

THE third class of exceptions to the hearsay rule consists of statements contained in public or official documents; which, subject to the qualifications hereinafter specified, are admissible in proof of the facts recorded even against strangers.

Principle.—The general grounds of reception are (1) that the statements and entries have been made by the *authorized agents of the public in the course of official duty*; and (2) that the facts recorded are of *public interest or notoriety*. To which may be added (3) *necessity*, since it would not only be difficult, but often impossible, to prove facts of a public nature by means of actual witnesses examined upon oath (Tay. s. 1591).

The following are the principal documents of this description:—

- (1) Statutes, Parliamentary Journals, and Gazettes.
- (2) Public Registers and Records.
- (3) Public Inquisitions, Surveys, Assessments, and Reports.
- (4) Official Certificates.
- (5) Corporation, Company, and Bankers' Books.
- (6) Public Histories, Maps, Almanacs, Tables, &c.

STATUTES, PARLIAMENTARY JOURNALS, AND GAZETTES.—Recitals of public matters contained in any *Public Statute*, *Royal Proclamation*, *Speech from the Throne*, or *Parliamentary Journal*, are *prima facie* evidence of such matters, even against strangers (*R. v. Sutton*, 4 M. & S. 532; *R. v. Francklin*, 17 How. St. Tr. 636-8; *A.-G. v. Bradlaugh*, 14 Q. B. D. 667). But *Private Acts*, though judicially noticed, are not evidence against strangers either of the facts recited (*Beaufort v. Smith*, 4 Ex. 450) or as notice thereof (*Ballard v. Way*, 1 M. & W. 529). So, the *Government Gazettes* of London, Edinburgh, and Dublin are *prima facie*, and sometimes conclusive, evidence of the public, though not of the private, matters contained.

PUBLIC REGISTERS AND RECORDS.—Official registers and records are admissible in proof of the facts recorded, even against strangers, when (1) the book is one required by law to be kept for public information or reference; and (2) the entry has been made promptly, and by the proper officer [**339-354**].

Principle.—Admissibility here depends on the *public duty* of the person who keeps the register to make such entries after *satisfying himself of their truth*; it is not that the writer makes them contemporaneously, or of his own knowledge, for no unofficial person can make such entries (*Doe v. Andrews*, 15 Q. B. 756; *Sturla v. Freccia*, 5 App. Cas. 623, 644).

Qualifications—(1) *Public Duty and Benefit.*—There must be a legal duty to keep the register for the benefit or information of the public; registers kept merely under private authority, or for private information, being inadmissible (*Sturla v. Freccia*, *sup.*). Examples of the former are *parish registers*, which are receivable as kept formerly under the common law, and now under statute. Examples of the latter are *Nonconformist* and other *non-parochial registers* which, until the last century, were not kept under legal authority, and could only be received in evidence if admissible upon other

grounds, *e.g.*, as declarations by deceased persons in the course of duty. By 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, however, many of these early records were rendered admissible upon proof of *deposit with the Registrar-General, entry in his list, and notice* to the opposite party of the intention to use them. Since 1836, the proof of births, marriages, and deaths of Nonconformists has been regulated by general registration Acts. So, *Colonial registers* are receivable if kept by the law either of their own or of this country; and *Foreign registers* if kept under public authority and recognized by the local tribunals (*Lyell v. Kennedy*, 14 App. Cas. 437).

(2) *Proper Officer. Promptness. Originality. Interest.*—The entries must have been made by, or under the direction of, the person whose duty it is to make them at the time (*Doe v. Bray*, 8 B. & C. 813); and promptly; thus an entry more than a year after the event has been rejected (*ibid.*). But originality is not strictly essential, for many old registers were mere periodical transcripts from current notes; and, generally speaking, trifling errors, erasures, and irregularities affect weight and not admissibility, as does the fact that the entry operated in the interest of the officer or body keeping the register (*Sturla v. Freccia, supra*).

EXAMPLES.

Admissible.

An entry in a vestry book is receivable to prove the election of a parish officer and its regularity (*R. v. Martin*, 2 Camp. 100).

Registers of Births, Marriages and Deaths kept under 6 & 7 Will. IV. c. 86, ss. 31, 38, are by that Act made evidence of these events and their dates.

Minute-books of meetings of creditors, kept under the Bankruptcy Act, 1914, and signed by

Inadmissible.

An entry in a parish book by a parish officer as to the giving of a certificate whereby the parish was relieved from the support of a pauper, held not admissible because the entry was not of a public nature, but concerned merely the particular parish and its rights with relation to another; and also because the entry being private was self-serving (*R. v. Debenham*, 2 B. & Ald. 185).

A register of bankruptcy certificates, kept, under the old law, in the office of the Secretary of

Admissible.

the chairman either of that or of the next ensuing meeting, are evidence of the validity of the meetings held and resolutions passed (s. 138, sub-s. 1 and 2), as well as of the correctness of the chairman's decision on all incidental questions arising thereat (*Re Indian Zoedone Co.*, 26 Ch. D. 70).

The Registers of Merchant Ships are *prima facie* evidence of the matters stated, *e.g.*, of Nationality, Ownership, Tonnage (Merchant Shipping Act, 1894, ss. 64, 695).

University and college books are admissible to prove degrees conferred and other collegiate proceedings (*Tracy Peerage*, Minutes of Evidence, 68). Where the practice was not to sign the entries, unsigned entries are receivable (*Lauderdale Peerage*, 10 App. Cas. 692, 700; *post*, 113).

The Law List is *prima facie* evidence of the qualification of the solicitors and conveyancers named therein (23 & 24 Vict. c. 127); and the absence of a name evidence of non-qualification (*R. v. Wenham*, 10 Cox 222). So, the Medical Register is evidence of the qualification of medical men (21 & 22 Vict. c. 90, s. 27).

The Army List purporting to be published by authority, and either to be printed by a Government printer or to be issued by H.M. Stationery Office, is evidence of the rank, appointments, and corps of the officers named [Army Act, 1881, s. 163, sub-s. (d)]. See *post*, 112].

Inadmissible.

Bankrupts, but not under the orders of the Lord Chancellor or any public authority; and the entries in which were made indiscriminately by any of the clerks in the office as mere private memoranda for the information of inquirers, held inadmissible (*Henry v. Leigh*, 3 Camp. 449).

An attendance register kept by the medical officer of a union under the orders of the Poor Law Commissioners, and intended to operate as a check upon himself, held inadmissible, the entry not being of a public nature (*Merrick v. Wakley*, 8 A. & E. 170; *Irish Society v. Derry*, 12 C. & F. 641, *per Parke*, B.).

To prove the marriage of a fellow of a college—the practice being for entries in college books to be made and signed by the registrar—unsigned entries relating to the marriage, though in a deceased registrar's handwriting, held inadmissible (*Fox v. Bearblock*, 17 Ch. D. 429).

The Law List has been held not evidence of the date of a solicitor's certificate (*Raven v. Stevens*, 3 T. L. R. 67).

Navy lists, clergy lists, university calendars, peerages, directories, court guides, and similar unofficial publications are not admissible (Tay. s. 1785; Hubback, Evidence of Succession, 700-703). See, however, as to certificates of naval and military service, *post*, 112.

PUBLIC INQUISITIONS, SURVEYS, ASSESSMENTS, AND REPORTS.—Inquisitions, surveys, assessments, and reports are admissible in proof of their contents, even against strangers, if made under public authority, and in relation to matters of public interest or concern [355-362].

Principle.—The ground of reception is that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public are interested (*Sturla v. Freccia*, 5 App. Cas. 623). Many of them, indeed, partake as much of the nature of opinion evidence or judgments, as of hearsay as hitherto defined. Thus they resemble judgments *in rem* (*post*, 126-7), in being receivable against strangers, but are distinguishable, not only in seldom affording conclusive evidence of the matters determined, but in being in many instances founded on unsworn testimony.

Qualifications.—*Public Authority and Purpose.*—There must be a judicial or quasi-judicial duty to inquire by a public officer, and the matter inquired into must be of a public nature, or required to be ascertained for a public purpose (*ibid.*). Inquisitions to ascertain the rights of the Crown in the estates of deceased persons are public, in this sense, if not made for a merely temporary purpose (*Mercer v. Denne*, 1905, 2 Ch. 538). Inquisitions, etc., made under public legal authority, but for private purposes, *e.g.*, judgments, may, of course, be receivable between parties and privies; and those made under private authority and for private purposes may be evidence against the party as admissions.

Excess of Jurisdiction, Irregularity. Interest.—If the inquiry be *ultra vires* (*Evans v. Taylor*, 7 A. & E. 617), or the proceedings irregular (*Powis Peerage*, Cruise, c. 6, s. 60), the evidence will be rejected; though, where an inquisition has been acted on, regularity may be presumed (Hubback, 591). The fact

that the return operates in the interest of the officer making it only affects weight, not admissibility (*Irish Society v. Derry*, 12 C. & F. 641).

EXAMPLES.

Admissible.

Inquisitions and surveys of manors belonging to the Duchies of Cornwall and Lancaster (while the Dukes had sovereign rights) are evidence of the manorial customs and boundaries specified therein [*Beaufort v. Smith*, 4 Exch. 450; they have also been received as *reputation*, *Smith v. Brownlow*, 9 Eq. 241; *ante*, 92].

Parliamentary surveys (*i.e.*, surveys of Church and Crown lands made by commissioners during the Commonwealth) are evidence of the matters stated, though only taken under the *de facto* authority of a usurper (*Freeman v. Read*, 4 B. & S. 179).

A bishop's returns in obedience to writs from the Exchequer, stating the vacancies, &c., in his diocese, are admissible as statements by a public officer in discharge of a public duty (*Irish Society v. Derry*, 12 Cl. & F. 641). So also, an incumbent's return in answer to inquiries by his bishop, for the information of the governors of Queen Anne's Bounty, being in the nature of an inquisition in a public matter (*Carr v. Mostyn*, 5 Ex. 69).

Land Tax Assessments are evidence of the assessment upon the person, and for the property named, as well as of occupation (*Doe v. Seaton* 2 A. & E. 171). So, also, Poor-rate books of the occupation or ownership of the persons rated at any given time (*Smith v. Andrews*, 1891, 2 Ch. 678).

The order of a Naval Court, held under the Merchant Ship-

Inadmissible.

A survey made by the commissioners of the Earl of Leicester of lands then his own, but afterwards becoming Crown lands, held inadmissible as made under private authority although preserved in a public office (*Daniel v. Wilkin*, 7 Ex. 429).

A survey made by direction of Oliver Cromwell, when Lord General of the Parliamentary forces, of lands granted to him by Parliament, held inadmissible as made under private authority (*Beaufort v. Smith*, *supra*).

A survey and report defining, *inter alia*, the boundaries of a *Duchy* manor, and made under 4 Edw. I. stat. 1, by a deputy surveyor general, *temp.* Eliz.—held inadmissible, the statute giving no power to ascertain boundaries (*Evans v. Taylor*, 7 A. & E. 617). So, also, a return to a commission not signed or sealed, for *non constat* it was not a draft (*Slane Peerage*, 5 C. & F. 23).

Land Tax Assessment Books are no evidence of seisin; nor of the names of the occupiers, where proof is given that it was usual to make no alteration in the name so long as the land was in the *same family* (*Doe v. Arkwright*, 2 A. & E. 182 n.).

A Board of Trade inquiry under the Merchant Shipping

Admissible.

ping Act, 1894, discharging a seaman from his ship for disobedience,—held conclusive evidence of such disobedience in an action for wrongful dismissal by the seaman against the shipowner, although the latter was no party to the original proceedings (*Hutton v. Ras*, 1907, 2 K. B. 834).

The report, made by a committee of the General Medical Council, finding a dentist guilty of professional misconduct, has been held *prima facie* evidence of such misconduct in an action by another dentist against the dentist in question [*Hill v. Cliff*, 1907, 2 Ch. 236, C.A., affirmed on other grounds *sub nom. Clifford v. Timms*, 1908, A.C. 12. The order, based on the report, striking him off the register, was also held conclusive of his disqualification.]

Inadmissible.

Act, 1854, resulting in the suspension of a master's certificate on the ground of negligence, is inadmissible to prove such negligence in an action against the owners, although by s. 18 of the Act made *prima facie* evidence of the truth of the matters stated (*M'Allum v. Reid*, L. R. 3 Ad. & E. 57 n.) So, as to *Wreck inquiries* under the same Act (*Nothard v. Pepper*, 17 C. B. N. S. 39).

The report of a committee, appointed by a foreign State, as to the fitness of a candidate for the post of Consul is not evidence of his age, or other personal facts reported; such an authority not being a legal one for a public purpose, nor the matter inquired into one of a public nature [*Sturla v. Freccia*, 5 App. Cas. 623. It is also inadmissible as a declaration by deceased persons, either against pecuniary interest, or in course of duty, or as to pedigree: *id.*, at pp. 632, 638, 640-2].

OFFICIAL CERTIFICATES.—The certificates of public officers, intrusted by law with authority for the purpose, are evidence of the *facts* authorized to be certified, but not of extraneous matters. And where it is part of the duty of an official to supply *copies* of any document entrusted to his care, such copies are admissible as secondary evidence of the originals [363-371].

At **Common Law**, a certificate of a mere matter of fact not coupled with matter of law, is generally speaking inadmissible, though given by a person in an official position, or even, it has been said, by the Sovereign under the sign-manual (*Omichund v. Barker*, Willes, 549-50; see, however, *Mighell v. Johore*, *infra*, 112). If

the person was bound to record the fact, the proper evidence is a copy of the record duly authenticated; but as to matters which he is not bound to record, his certificate being extra-judicial, is merely the unsworn statement of a private person and will be rejected (Tay. s. 1784). Some exceptions, however, have been allowed to this rule partly, perhaps, in analogy to the early trials by certificate, in which the certificates of certain functionaries, *e.g.*, those of a bishop as to marriage, or of the Recorder as to the customs of London, were conclusive; and partly on grounds of convenience.

By **Statute**, also, a variety of matters have been rendered provable by the certificates of officials, either generally, or for the special purposes of given Acts; the certificates being sometimes made conclusive, and sometimes *prima facie*, evidence of the matters certified.

EXAMPLES.

Admissible.

A certificate or letter from, or on behalf of, a Secretary of State in his official capacity is, at Common Law, equivalent to a certificate or letter from His Majesty, and is conclusive evidence of the matters stated, *e.g.*, the independence of a foreign Sovereign (*Mighell v. Johore*, 1894, 1 Q. B. 149).

The *Dismissal of Charges of Assault* may be proved by the justices' certificate stating the fact of such dismissal (24 & 25 Vict. c. 100, ss. 42, 43; *post*, 170).

Incorporation of Joint Stock Companies. — The Registrar's certificate is *conclusive* evidence that all requisitions in respect of registration, or matters precedent or incidental thereto, have been complied with, and that the Company is authorized to be, and has been, duly registered [Companies (Consolidation) Act, 1908, s. 17].

Proprietorship of Shares.—A certificate under the common

Inadmissible.

An officer's certificate is not, at Common Law, evidence of the military service, &c., of a subordinate [*Robinson v. Buccleuch*, 31 Sol. Jo. 329, C. A.; though *aliter*, now under the Army Act, 1881, sec. 163, as to the certificate of an officer commanding any portion of his Majesty's forces, or of any of his Majesty's ships (*ante*, 108)].

Admissible.

seal of the company is *prima facie* evidence of the title of a member to the shares specified [Companies (Consolidation) Act, 1908, s. 23].

Adulteration of Food.—Under the Sale of Food and Drugs Act, 1875, s. 21, the analyst's certificate is sufficient evidence against the defendant of the result of the analysis, unless he requires the analyst to be called as a witness, or gives rebutting proof (*Hewitt v. Taylor*, 1896, 1 Q. B. 287).

Inadmissible.

Adulteration of Food.—A certificate obtained, under the Act *opposite*, in proceedings against a retail dealer is not admissible on a subsequent charge against the wholesale vendor (*Tyler v. Kingham*, 1900, 2 Q. B. 413); nor even on a second charge against the same defendant (*Fulham Council v. Farmers' Co.*, 39 L. Jo. 195).

CORPORATION, COMPANY, AND BANKERS' BOOKS.—Entries in the public books of a corporation, made by the proper officer, are at *common law* evidence, even against strangers, of the official acts and proceedings of the corporation, and are by *statute* often made evidence of private matters as well [372-377].

At **Common Law**, the books must have been publicly kept as the corporation books (*Shrewsbury v. Hart*, 1 C. & P. 113), and the entries made by the usual officer or his substitute (*R. v. Mothersell*, Stra. 93). Where there has been a usage to sign, unsigned entries will be rejected (*Fox v. Bearblock*, *ante*, 108); though *aliter*, where the usage was the other way (*Lauderdale Peccage*, *ante*, 108). Entries in the public books as to *private matters*, and entries in the private books, are only receivable as admissions against the corporation, or members who have acquiesced in them (*Hill v. Manchester Waterworks*, 5 B. & Ad. 866). Private entries have, however, been received on questions of ancient possession, not as evidence of the facts stated, but to show acts of ownership (*ante*, 27-8, 32).

By Statute.—The books of corporations and public companies are frequently rendered admissible by statute

in proof of their contents both as to public and private matters. Thus the Minute-Books authorized to be kept under the *Municipal Corporations Act*, 1882 (incorporated with the *Local Government Act*, 1888), s. 22, are receivable in evidence without further proof; and the Registers and Minute-Books of companies, subject to the *Companies Clauses Consolidation Act*, 1845 (ss. 9, 98), or the *Companies (Consolidation) Act*, 1908 (ss. 25, 71), are also *primâ facie* evidence of the matters stated.

Bankers' Books.—Copies of entries in bankers' books are receivable in all legal proceedings (for or against any one, *Harding v. Williams*, 14 Ch. D. 197), as *primâ facie* evidence of the entries, or of the matters, transactions, and accounts therein recorded, upon proof that (1) the book was, at the time of the entry, one of the ordinary books of the bank; (2) that it is in the custody or control of the bank; and (3) that the entry was made in the ordinary course of business (*Bankers' Books Evidence Act*, 1879, ss. 3 and 4). Such proof may be given by a partner or officer of the bank, either orally or by affidavit (s. 4). And the copy must be an examined copy, proved orally or on affidavit by some person (not necessarily a bank official, *R. v. Albut*, 6 Cr. App. R. 55) who has examined it with the original entry (s. 5).

Production of Original Books.—No banker or officer of a bank is, in any legal proceedings to which the bank is not a party, compellable to produce the bank books, or to appear as a witness to prove their contents, unless by order of a judge for special cause (s. 6).

Inspection.—A Court or judge may, on the application of any party to a legal proceeding, empower such party to inspect and take copies of entries of the accounts, either of parties or strangers (*Howard v. Beall*, 23 Q. B. D. 1; but see *Pollock v. Garle*, 1898, 1 Ch. 1), for the purpose of the proceedings (s. 7). Such order may be made *ex parte* (*Arnott v. Hayes*, 36 Ch. D. 731), but must, unless otherwise directed, be served upon the bank three clear days (exclusive of Sundays and bank holidays) before it is to be obeyed.

Pass-Books.—In actions between the bank and a customer the pass-book is evidence against either party as an admission (*Gaden v. Newfoundland Bank*, 1899, A. C. 281).

HISTORIES, MAPS, DICTIONARIES, ALMANACS, TABLES, ETC. [378-381].

Histories.—Approved public and general histories are admissible, in the nature of public documents or reputation, to prove ancient facts of a *public*, though not of a *private* or *local*, nature (*Read v. Bp. of Lincoln*, 1892, A. C. 644, 653). **Maps**.—And published maps, generally offered for public sale, are, on similar grounds, admissible to show the relative positions of towns and countries and other matters of general geographical notoriety (*R. v. Orton*, cited Steph. art. 35; *R. v. Jameson*, Official Rep. 91-5). Maps and Surveys may be admissible not only (1) under the above heading; but also (2) as *public documents* (*ante*, 109); or (3) as *reputation* (*ante*, 92). And (4) private maps and plans may, of course, be received as *admissions* against the party under whose authority they were prepared, or his successors in title (*ante*, 62, 67). **Dictionaries**.—Standard dictionaries are admissible to show the meaning of words, not merely as refreshing the memory of the judge (*ante*, 8), but probably also as evidence *per se* (*R. v. Peters*, 16 Q. B. D. p. 641; Wigram, Extr. Ev. s. 56). **Scientific Works**.—The *Carlisle Tables* have been admitted as evidence of the average duration of life at a particular age, on proof that they were accepted as authoritative by insurance companies (*Rowley v. L. & N. W. Ry. Co.*, L. R. 8 Ex. 221); the *British Pharmacopœia* as evidence of the proper standard for drugs (*Dickins v. Randerson*, 1901, 1 K. B. 437); and the *Almanac*, annexed to the Book of Common Prayer, as evidence of the matters contained therein (*Tutton v. Darke*, 5 H. & N. 647).

CHAPTER XX.

REPUTATION, OPINION, AND BELIEF.

[382-403.]

NEITHER the general reputation prevailing in the community, nor the opinions, inferences, or beliefs of individuals (whether witnesses or not), are admissible in proof of material facts.

Principle.—Evidence of this nature is sometimes said to be excluded by the hearsay rule; but it is in general inadmissible whether delivered on oath or not. The grounds more commonly assigned for its rejection are that opinions, in so far as they may be founded on no evidence, or illegal evidence, are worthless; and in so far as they may be founded on legal evidence, tend to usurp the functions of the tribunal whose province alone it is to draw conclusions of law or fact (Best, s. 511).

EXCEPTIONS.

(A) **REPUTATION.**—General reputation is admissible, partly by reason of the difficulty of obtaining better evidence, and partly because “the concurrence of many voices” among those most favourably situated for knowing, raises a reasonable presumption that the facts concurred in are true, in proof of **Public Rights**, and **Pedigree**, the conditions being similar to those governing hearsay on the same topics (*ante*, 89-92, 94-6). Evidence of general reputation (not confined, as in pedigree cases, to *family* repute) is also receivable to prove **Marriage**, though in cases of bigamy and divorce it is not *per se* sufficient. The testimony, however, must be general; if based merely on the statements of particular individuals, it ceases to be admissible under this head, and can only be received as the declaration of

a deceased relative and on questions strictly of pedigree (*Shedden v. A.-G.*, 30 L. J. P. M. & A. 217). General reputation is also sometimes admitted on questions of **Identification**; thus, to prove that a libel referred to the plaintiff, evidence that he was publicly jeered at in consequence of the libel has been received (*Cook v. Ward*, M. & P. 99).

(B) **OPINIONS OF EXPERTS** (a).—The opinions of experts are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a *course of special study or experience*, e.g., Science, Art, Trade, Technical Terms, Handwriting, or Foreign Law. When (i) the subject is one upon which the Court or jury is as capable of forming an opinion as the witness, e.g., the meaning of legal terms, the construction of documents, or disputed points of duty, morality, or etiquette—or (ii) the Court is assisted by Assessors, as in Admiralty cases involving questions of nautical skill, the evidence is inadmissible.

Competency and Credit.—The competency of the expert is a preliminary question for the judge; though in practice considerable laxity prevails on the point, and the fact that the expert has not acquired his knowledge professionally goes merely to weight and not to admissibility (*R. v. Silverlock*, 1894, 2 Q. B. 766). Thus, unqualified practitioners, hospital students, and dressers have been permitted to testify as *medical experts*; and accountants, familiar with the business of life insurance, as *actuaries*. So, in *foreign law*, the expert may be either a professional lawyer or a person “*peritus virtute officii*,” i.e., the holder of an official situation which requires, and therefore presumes, legal knowledge (*Sussex Peerage Case*, 11 C. & F. 124); or perhaps some other person who from his profession or business has had peculiar means of becoming acquainted with the law in question (*Van der Donckt v. Thellusson*, 8 C. B. 812). On the other hand, an English barrister who has only theoretically studied, but not practised, the law of the foreign country, is incompetent (*Re Turner*, 1906, W. N. 27; *Re Bonelli*, 1 P. D. 69). The *credit* of the expert may be impeached by showing that he

was not in a fit state to form an opinion, or is interested, or corrupt, or has expressed a contrary opinion at other times (*Alcock v. Royal Exchange Co.*, 12 Q. B. 292). And where there is a conflict between direct testimony as to facts, and mere speculative opinion, the former should prevail (*Poynton v. P.*, 37 Ir. L. T. R. 54; *Aitken v. McMeekan*, 1895, A. C. 310).

Scope of the Opinion. Hypothetical Questions (b).

—An expert may give his opinion upon *facts* which are either admitted, or proved by himself, or other witnesses in his hearing, at the trial; or upon *hypothesis* based upon the evidence. But his opinion is not admissible upon materials which are not before the jury, or which have merely been reported to him by hearsay (*Wright v. Tatham*, 5 C. & F. 670, 690; *R. v. Staunton*, Times, Sept. 26, 1877). And though, on questions of professional skill, he may state what would be the proper course to pursue under the circumstances proved (*Sills v. Brown*, 9 C. & P. 604), he may not be asked what he himself would have done (*Ramadge v. Ryan*, 9 Bing. 333).

How far he may be asked the *very question which the jury have to decide* is somewhat doubtful, but the weight of authority appears to be as follows:—
(a) Where the issue involves other elements besides the purely scientific, the expert must confine himself to the latter, and must not give his opinion upon the legal or general merits of the case (*Seed v. Higgins*, *post*, 119); (b) Where the issue is substantially one of science or skill merely, the expert may, if he has *himself* observed the facts, be asked the very question which the jury have to decide (*Martin v. Johnston*, 1 F. & F. 122); if, however, his opinion is based merely upon facts proved by *others*, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion upon it; the correct course is to put such facts to him *hypothetically*, asking him to assume one or more of them to be true, and to state his opinion upon those (*R. v. Frances*, *post*, 120; *R. v. Mason*, 28 T. L. R. 120).

Grounds of Opinion. Corroboration. Illustration.

Experiments (c).—In all cases in which opinion evidence is receivable, the grounds or reasoning upon which the opinion is based may be inquired into; and facts and experiments, although otherwise irrelevant to the issue, may be given in evidence in corroboration, illustration, or rebuttal of the opinion.

Reference to Text-Books, Price Lists, &c.—An expert may refer to text-books to refresh his memory, or to correct or confirm his opinion—*e.g.*, a doctor to medical treatises, a valuer to price lists, a foreign lawyer to codes, text-writers, and reports. If he describe particular passages as accurately representing his views, they may be read as part of his testimony, though such books are not, of course, evidence, *per se* (*Concha v. Murietta*, 40 Ch. D. 543).

EXAMPLES.

Admissible.

(a) The question being whether a covenant in restraint of trade was reasonable;—evidence by persons engaged in the trade is admissible as to its nature, what is customary in it, any particular dangers requiring precautions, and the precautions so required (*Haynes v. Doman*, 15 T. L. R. 354, C. A.).

In patent actions, experts may give their opinions as to: (1) The meaning of the technical terms employed; (2) the state of scientific knowledge existing at the time of the grant; (3) the nature, working, characteristic features, and probable mechanical results of an invention; together with what is old or new in the specification and how far any scientific advance has been made thereby; as well as (4) in the case of rival inventions, the similarities or differences therein and how far these are material or the reverse (*Clark v. Adie*, 2 App. Cas. 423; *Gadd v. Manchester*, 67 L. T. 569).

Inadmissible.

(a) The question being as to the reasonableness of a covenant in restraint of trade;—the opinions of persons engaged in the trade that the covenant was, or was not, reasonable, are inadmissible, this being a question of construction and legal effect for the Court (*Haynes v. Doman*, *opposite*).

In patent actions, experts may not give their opinions upon the construction of the specification (*Gadd v. Manchester*, *opposite*); nor as to whether there is, or is not, a want of novelty (*Parkinson v. Simon*, 11 R. P. C. 493, 506); nor whether the defendant's invention infringes the plaintiff's patent, or not (*ibid.*; *Seed v. Higgins*, 8 H. L. C. p. 566).

The meaning of "Nominal Rent," under the Income Tax Acts, is not a subject on which the opinions of surveyors, etc., can be received (*Camden v. Commrs. of Income Tax*, 136 L. T. Jo. 166, C. A.).

Admissible.

(b) The question being whether A., tried for murder, was insane, *i.e.*, incapable of judging between right and wrong;—a medical witness who has examined A. may give his opinion that A. was insane (*R. v. Layton*, 4 Cox 149; *R. v. Richards*, 1 F. & F. 87); and that his insanity was of a kind that usually prevents people from judging between right and wrong [Steph. art. 49, illustr. (b)]. If the witness has merely heard the evidence of other witnesses as to A.'s condition, he may be asked to take particular facts, detailed by such witnesses, and assuming them to be true, to give his opinion as to A.'s sanity (*R. v. Frances*, 4 Cox 57; *R. v. Mason*, 28 T. L. R. 120).

The question being whether a medical man had negligently treated a patient;—medical witnesses may be asked whether, assuming the facts proved to be true, they consider there was anything improper in the treatment described (*Rich v. Pierpoint*, 3 F. & F. 35); or whether such treatment is, or is not, sanctioned by books of authority (*Collier v. Simpson*, 5 C. & P. 73); or whether the result produced could have been avoided by proper care (*Fenwick v. Bell*, 1 C. & R. 312, the case of a nautical witness).

(c) The question being whether an obstruction to a harbour was caused by a neighbouring sea-wall;—an engineer who has given his opinion in the negative may support it by proof that in some cases harbours along the same coast, but where there were no sea-walls, were similarly obstructed (*Folkes v. Chadd*, 3 Doug. 157; *Metropolitan Asylum District v. Hill*, 47 L. T. 29).

Inadmissible.

(b) The question being whether A., tried for murder, was insane, *i.e.*, incapable of judging between right and wrong;—a medical witness who has examined A. cannot be asked whether A. was capable of judging between right and wrong (*R. v. Layton*, 4 Cox 149); or was responsible for his acts (*R. v. Richards*, 1 F. & F. 87); or was guilty of murder (*Jameson v. Drinkald*, 12 Moore, C. P. 148, 157). A medical witness who has merely heard the evidence of other witnesses as to A.'s condition cannot be asked whether, "having heard the evidence, he considers A. is or is not insane?" (*R. v. MacNaghten*, 10 C. & F. 200; *R. v. Frances*, *opposite*).

The question being whether a medical man had negligently treated a patient;—a medical witness cannot be asked whether having heard the evidence he considers there has been a want of due care and skill (*Rich v. Pierpoint*, *opposite*); nor whether, assuming the facts proved to be true, they show negligence (*Malton v. Nesbit*, 1 C. & P. 72; *Jameson v. Drinkald*, 12 Moore 148, cases of nautical witnesses); nor can he put in evidence medical works to show what treatment would be proper (*Collier v. Simpson*, *opposite*).

(c) The question being whether an obstruction to a harbour was caused by a neighbouring sea-wall;—proof that some other harbours along the same coast where there were such walls had been similarly obstructed was rejected, as an attempt *litem lite resolvere* (*Folkes v. Chadd*, *opposite*; cited, also *ante*, 44).

(C) **OPINIONS OF NON-EXPERTS.**—The opinion or belief of ordinary witnesses is admissible in proof of the following matters, on grounds of necessity, more direct and positive evidence being frequently unattainable:—

Identity. Resemblance. Photographs.—Witnesses may state their belief as to the identity of persons, whether present or absent; and they may also identify absent persons by *photographs* produced and proved by any competent testimony, not necessarily that of the photographer, to be accurate likenesses (*R. v. Tolson*, 4 F. & F. 103). In matrimonial cases, however, the Court will not, unless under very special circumstances, act upon identification by photograph alone (*Frith v. Frith*, 1896, P. 74). So, they may give their opinion as to the resemblance of an engraving to a picture not produced (*Lucas v. Williams*, 1892, 2 Q. B. p. 116); or of a portrait, that is produced, to one of the parties in court (*Milles v. Lamson*, *Times*, October 29, 1892).

Libels. Threats (a). *Reference to Plaintiff.*—The opinion of witnesses is admissible to prove that a libel (*R. v. Barnard*, *post*, 122), or threat (*R. v. Hendy*, *post*, 123) refers to the complainant. *Meaning of Words.*—So, their opinions are receivable to explain the meaning of ordinary words used in a *peculiar* sense, as where a slanderous meaning is imputed to apparently innocent language; provided a foundation be first laid by asking the witness whether there was anything in the circumstances of the case, or in the conduct or tone of the speaker, to prevent the words from conveying their ordinary meaning, the question may then be put, "What did you understand by the words?" (*Daines v. Hartley*, 3 Ex. 200).

Handwriting (b).—The genuineness of a party's handwriting, or mark, may be similarly proved, the standard of comparison being either some specimen document produced at the trial and proved to the satisfaction of the judge to be genuine (*ante*, 26-7), or, an exemplar formed in the mind of the witness from his *previous knowledge* of the party's handwriting. A statement that the witness is acquainted with the

party's writing is sufficient in chief, it being for the opponent to cross-examine as to means and extent. Such knowledge may be acquired:—(1) *By having at any time seen the party write*; or (2) *by the receipt of written communications* purporting to be in his handwriting, in reply to documents addressed to him, by, or on behalf of, the witness; or (3) *by having observed, in the ordinary course of business, documents purporting to be in the party's handwriting*. Such evidence is primary and not secondary in its nature, and will not be inadmissible because the writer himself, or some one who saw the document written, might have been called, or because the document itself cannot be produced (*Lucas v. Williams*, 1892, 2 Q. B. 113; *ante*, 12). The witness (*e.g.*, a constable), must not have acquired his knowledge for the express purpose of enabling him to testify at the trial (*R. v. Crouch*, 4 Cox 163; *R. v. Rickard*, 13 Cr. Ap. R. 140).

Mental and Physical Conditions. Age. Value. Rate of Speed. Interlocutory Proceedings (*c*).—Witnesses may, as we have seen, testify to their *own* condition at a given time, though not to that of *others*, the proper course being to state the facts from which the latter may be inferred (*ante*, 17-8). Their opinions as to *age* (*R. v. Cox*, 1898, 1 Q. B. 179), *value* (*R. v. Beckett*, *post*, 124), and the *rate of speed* of motor cars, etc. (Motor Car Act, 1903, s. 9), are also receivable. And, in interlocutory proceedings, statements as to information and belief are admissible, provided the grounds thereof are set out, otherwise not (*Re Young Manufacturing Co.*, 1900, 2 Ch. 753).

EXAMPLES.

Admissible.

(a) A. sues B. for libel. To prove that the libel, which did not mention A. by name, referred to him;—both A. and his friends may swear that, upon reading it, they understood it to refer to him (*R. v. Barnard*, 43 J. P. 127).

A. sues B. for damages for

Inadmissible.

Admissible.

destroying a picture called "Beauty and the Beast." B.'s defence is that the picture was a libel on his sister and her husband;—evidence was admitted of exclamations of recognition to that effect uttered by spectators while looking at the picture in a public gallery (*Du Bost v. Beresford*, 2 Camp. 511, 512).

A. is charged with threatening that if B. sold his farm to certain persons he would "suffer as before;"—B., after explaining the circumstances, may state that he understood by the expression that A. intended to burn his house down (*R. v. Hendy*, 4 Cox 243).

(b) To prove A.'s handwriting, the opinion of (1) B., who has seen him write but once, and then only his surname (*Lewis v. Sapio*, M. & M. 39); (2) of C., who only saw him write twenty years ago (*R. v. Tooke*, 25 How. St. Tr. 71); (3) of D., A.'s servant, who has never seen him write, but has habitually posted his letters (*Doe v. Suckermore*, 5 A. & E. 703, *per* Ld. Denman); (4) of E., a merchant in London who has written to, and received answers purporting to come from A. abroad (*Carey v. Pitt*, Peake Add. Cas. 130); (5) of F., E.'s clerk, who has constantly read such letters; and (6) of G., H.'s broker, who has habitually seen and been consulted about them, are admissible;—although neither E., F., nor G., ever saw A. write (*Doe v. Suckermore*, *supra*).

Inadmissible.

A. sues B. for libel in having written that A. should "return to his natural and sinister obscurity." The opinions of witnesses are not admissible to explain these words, there being nothing to show that they were not used in their ordinary sense (*Brunswick v. Harmer*, 3 C. & K. 10).

(b) To prove the handwriting of A. (a prisoner), the opinion of a constable, who in order to obtain a knowledge of his writing had paid him some money, and got him to write a receipt, is inadmissible (*R. v. Crouch*, 4 Cox 163).

To prove a defendant's handwriting, the opinion of the plaintiff's attorney, who had frequently seen and acted on papers in the master's office, which the defendant's attorney admitted had been written by the defendant, is inadmissible. [*Greaves v. Hunter*, 2 C. & P. 477. In *Smith v. Sainsbury*, 5 C. & P. 196, where one party had filed an affidavit made by A., the attorney to the opposite party was allowed to prove A.'s signature to another document from merely having seen the signature to the affidavit. This case is doubted by Mr. Taylor, 8th ed., s. 1865; but is perhaps supportable on the ground of estoppel (*cp. also, ante*, 74-6).]

Admissible.

(c) The question being whether A. at the date of her marriage to B. in Oct. 1882, was insane, —testimony not only of specialists, but of friends and relations “that A., though shy, was perfectly sane and intelligent down to the date of her engagement in Aug. 1882;— was received (*Durham v. Durham*, 10 P. D. 80, 84-5, *per* Hannen, J.; *ante*, 33).

In an action by a house-agent to recover commission on the sale of a house, the evidence of the purchaser that “he thought he should not have bought the house, had it not been for the agent’s card to view,” is receivable (*Mansell v. Clements*, L. R. 9 C. P. 139).

A. is charged with malicious damage of over £5 to a plate glass window at a post office. The Acting Assistant Superintendent to the General Post Office was allowed to testify that, though not a glass expert, he had been informed by their clerk of the works that the damage was £8, and in his own opinion that was a correct assessment (*R. v. Beckett*, 8 Cr. App. R. 204).

Inadmissible.

(c) The question being as to the sanity of a testator, the opinions of non-medical friends called as witnesses (*R. v. Neville*, Cr. & Dix Ab. Cas. 96), and the opinions of deceased friends expressed by their letters and conduct; or the fact that he was publicly elected to a responsible office, are inadmissible (*Wright v. Tatham*, 5 C. & F. 690, 721, 735). So, the fact that the testator’s father had left the latter property and so intimated his opinion that he was sane, was rejected (*Sutton v. Sadler*, 3 C. B. N. S. 99-100, *per* Cockburn, C.J.; *ante*, 33).

CHAPTER XXI.

JUDGMENTS AND DEPOSITIONS IN FORMER TRIALS.

[404-430.]

Judgments : General Rules.

THE following rules apply to judgments of every description :—

(1) **All Judgments Conclusive of their Existence as Distinguished from their Truth.**—Every judgment is conclusive evidence for or against all persons (whether parties, privies, or strangers), of its own existence, date, and legal effect, as distinguished from the accuracy of the decision rendered.

Principle.—The reason is, that a judgment being a public transaction of a solemn nature must be presumed to be faithfully recorded. But the law attributes unerring verity only to the *substantive* and not to the *judicial* portions of the record (Best, s. 590; Tay. s. 1667).

Thus where A. has been tried and acquitted of a crime against B., and afterwards sues B. for malicious prosecution, the record in the criminal trial is conclusive evidence of A.'s acquittal; but it is no proof whatever that A. is innocent, or that B. was the prosecutor, or actuated by malice (*Legatt v. Tollervey*, 14 East 302). So, a judgment by a creditor against a surety is evidence in an action by the surety against the principal debtor, of the amount the surety has been compelled to pay, but not of his liability to pay it (*King v. Norman*, 4 C. B. 884).

(2) **All Judgments Conclusive of their Truth in Favour of the Judge.**—For the purpose of protecting the judge who pronounced, and the officers who enforced

it, a judgment of a Court of competent jurisdiction is conclusive proof of the facts stated if, assuming such facts to be true, they show that the judge had jurisdiction.

Principle.—The rule is founded on public policy for the protection of judges and their subordinates, since without it no one would be so rash as to undertake such offices (Tay. s. 1699). Thus, where a justice had ordered the seizure of a boat under the provision of the Bumboat Act (2 Geo. III. c. 28), the owner was precluded in an action against the justice from proving that it was a vessel and not a boat (*Brittain v. Kinnaird*, 1 B. & B. 432).

(3) **All Judgments Impeachable on Certain Grounds.**—Every judgment, when tendered as evidence of the facts decided, may be impeached on the ground that it was (1) *not final*; or (2) *not on the merits*; or (3) *without jurisdiction*; or (4) *fraudulent, collusive, or forged*.

Judgments as Evidence of their Truth between Parties, Privies, and Strangers.

The admissibility of judgments as evidence for this purpose varies according as the judgment is *in rem* or *in personam*; but no judgment is evidence of any fact which merely came collaterally in question, or was incidentally cognizable, or can only be inferred by argument from the decision (*R. v. Duchess of Kingston*, *post*, 127). A judgment *in rem* is “an adjudication upon the status of some particular subject-matter by a tribunal having competent jurisdiction for that purpose,” *e.g.*, a decree of divorce, a grant of probate, or an adjudication in bankruptcy (2 Smith’s L. C., 11th ed. 752). A judgment *in personam* (or as it is sometimes called *inter partes*) is an ordinary judgment between parties in cases of contract, tort, or crime.

JUDGMENTS IN REM.—A judgment *in rem* is conclusive evidence, for or against all persons, of the *matters actually decided*. It is also, between parties and privies, conclusive of the *grounds of the decision* where these have been put in issue and decided; but as

between strangers, or a party and a stranger, it is no evidence of such grounds except upon questions of prize and in a few other cases.

Principle.—The principle of conclusiveness of judgments *in rem* as regards *persons* is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards *things*, that generally speaking every one who can be affected by the decision may protect his interests by becoming a party to the proceedings.

EXAMPLES.

Admissible.

A. obtains probate of B.'s will (which he has forged) and sues C. for a debt due to B.;—the probate is conclusive evidence, until revoked, that A. is B.'s executor and has the right to deal with his assets (*Allen v. Dundas*, 3 T. R. 125).

In an action between a ship-owner and an underwriter, the question being whether the cargo was neutral or enemy's property, the sentence of a foreign prize Court condemning the ship and cargo on the ground that the cargo was enemy's property, is conclusive, though neither plaintiff nor defendant were parties to the foreign proceedings (*Geyer v. Aguilar*, 7 T. R. 681).

Inadmissible.

A. obtains probate of B.'s will;—in proceedings between strangers the probate is neither conclusive nor, perhaps, admissible to show the genuineness of the will (*R. v. Buttery*, R. & R. 342), the sanity of the testator (*Marriot v. Marriot*, 1 Str. 671), his domicile (*Concha v. Concha*, 11 App. Cas. 541), nor his death (*Tay. s. 1677*).

A. is charged with bigamy in marrying B. during the lifetime of C.;—a decree obtained by A. against C., in a suit for jactitation of marriage, on the ground that C. was not A.'s husband, is not admissible in the bigamy proceedings to disprove A.'s marriage with C., since not being *in rem*, the decree could not be received *inter alios* (*R. v. Duchess of Kingston*, 20 How. St. Tr. 537-45).

JUDGMENTS IN PERSONAM AS AFFECTING PARTIES AND PRIVIES.—The judgment of a court of competent jurisdiction is conclusive proof of the *matter actually decided*, as well as of the *ground of the decision*, where these again come in controversy between the same parties or their privies (*R. v. Duchess of Kingston*, 20 How. St. Tr. 538; *Priestman v. Thomas*, 9 P. D. 210).

This rule applies, in general, equally to civil and criminal proceedings, and to County Courts, as well as to courts of summary jurisdiction. But judgments are only conclusive as evidence where they are either pleaded, or there has been no opportunity of pleading them, since if a party elect not to plead an estoppel where he may, he is deemed to waive it, and to leave the prior judgment as evidence only for the jury, who may find the contrary (*Conradi v. Conradi*, L. R. 1 P. & M. 514).

Principle.—The grounds upon which *parties* are precluded from re-litigating the same matter between them are, first, that of public policy, it being in the interest of the State that there should be an end of litigation, *interest rei publicæ ut sit finis litium*; second, that of hardship to the individual, that he should be twice vexed for the same cause, *nemo bis vexari pro eâdem causâ, nemo bis puniri pro uno delicto* (*Lockyer v. Ferryman*, 2 App. Cas. 519, *per* Lord Blackburn). The grounds upon which *privies* are concluded are, not only identity of interest, but also the principle *qui sentit commodum, sentire debet et onus* (*Re Lart*, 1896, 2 Ch. 788, 795).

Same Parties or their Privies. Mutuality (a).—The term *parties* embraces not only those named in the record, but probably (in conformity with the rule as to admissions) all persons who are substantially interested in the result (Tay. ss. 1687-8); though, in criminal cases, this does not include the prosecutor (*post*, 163). A party to be affected must, however, sue or defend in the *same right and character*; thus, a judgment against a man claiming *ex parte paternâ* will not bind him claiming *ex parte maternâ*; nor would a judgment against him personally be evidence against him in a representative capacity. So, a judgment in a criminal trial is not generally admissible against the same person in a civil action, nor *vice versâ*, since the parties are necessarily different (*Castrique v. Imrie*, *post*, 130, for an exception, see *Re Crippen*, 1911, P. 108, cited *ante*, 51).

Judgments are also conclusive for or against *privies* (*ante*, 66-7). Thus, judgments for or against an ancestor are evidence for or against his heir; those against a testator bind his executor, legatee, or devisee; and the same rule applies to grantees, mortgagees, and assignees, provided their titles accrued subsequently to the judgment (*Doe v. Derby*, 1 A. & E. 790; Tay. s. 1689).—So, a judgment against a partner or joint contractor is a bar to successive, but not to the continuance of joint, actions against the rest, though the judgment is unsatisfied (*Kendall v. Hamilton*, 4 App. Cas. 504, as modified by Jud. Act, O. 13, R. 4; O. 14, R. 5; O. 27, RR. 2-3). But where the liability is *joint and several*, it will not generally be so extinguished (*Blyth v. Fladgate*, 1891, 1 Ch. 337, 352; *cp. Goldrei v. Sinclair*, 1918, 1 K. B. 180, C. A.).

The rule requiring identity of parties is often expressed in another form by the maxim *estoppels must be mutual*; it being a well-established principle that no one can take advantage of a judgment unless he would also have been concluded had it gone against him (*Wenman v. McKenzie*, 5 E. & B. 447).

Same Subject-matter and Object (*b*).—In order that a former judgment should conclude the parties thereto or their privies, the matter in dispute must be the same in both proceedings; though it is not necessary that it should be the only point determined in either. The question of the identity of the issues, which is often one of great nicety, must be determined by the judge on reference to the pleadings in the former action, or, if necessary, to the actual words, duly verified, of the judgment itself. On the one hand, the issues may be the same, though the form of action and the marshalling of the parties may be different; on the other, the issues may be distinct, though both relate to the same transaction or property. The safest test is to inquire whether the *same evidence would support both issues*. It is now settled, however, that when once a given fact has been put in issue and decided between the parties, it will conclude them and their privies from re-litigating such fact in any subsequent proceeding, although

brought for a different purpose or object (*Priestman v. Thomas*, 9 P. D. 210).

Criminal Cases (c).—Similar rules apply here.

EXAMPLES.

Admissible.

(a) A. sues B. for infringement of patent. A. obtains judgment on the ground that the patent is valid. In a fresh action by A., for a subsequent infringement of the same patent, B. is estopped from impeaching the validity of the patent (*Shoe Machinery Co. v. Cutlan*, 1896, 1 Ch. 667).

Certain tenants of a manor, on behalf of themselves and all other tenants, sue the lord in respect of a manorial right. The judgment in this suit is conclusive in an action for the same cause between a subsequent lord and other tenants, the two sets of parties being privy in estate (*Llanover v. Homfrey* 19 Ch. D. 224).

(b) A. recovers judgment against B. for a debt, B. having pleaded, but failed to prove, payment. This judgment is conclusive proof that the debt was owing, in a subsequent action brought by B. against A. to recover the money, although B. had since found and now produced A.'s receipt for its payment (*Marriott v. Hampton*, 2 Smith's L. C. 11th ed. 421).

(c) A. is charged with the murder of B. and acquitted. His acquittal is conclusive of his innocence in a subsequent charge for the manslaughter of B., and probably *vice versa* (*R. v. Tancock*, 13 Cox 217, 219; Ros. Cr. Ev. 13th ed. 171).

Inadmissible.

(a) A. sues B. for infringement of patent. B. obtains judgment on the ground that the patent is invalid. On a subsequent petition by B., for the revocation of A.'s patent, A. is not estopped from again maintaining its validity, since B.'s petition is a proceeding on behalf of the public, and not one personally between A. and B. (*Re Deeley's Patent*, 1895, 1 Ch. 687).

A. is convicted of forging B.'s signature to a bill of exchange. B. is afterwards sued by C., to whom A. has transferred the bill. A.'s conviction is not admissible to prove the forgery (*per Blackburn, J.*, in *Castrique v. Imrie*, L. R., 4 H. L. p. 434. For a converse case, in which a civil judgment was rejected in a criminal trial, see *R. v. Fontaine Moreau*, 11 Q. B. 1028).

(b) A. sues B. for damages for false imprisonment and obtains judgment. A. is not barred from afterwards suing B. for damages for malicious prosecution, the cause of action being different, though the jury in the former trial were misdirected to consider B.'s malicious conduct (*Guest v. Warren*, 9 Ex. 379).

(c) A. is charged with the murder of B. and acquitted. His acquittal is no bar to a subsequent charge of arson causing B.'s death (*R. v. Serné*, 107 Sess. Pap. C. C. C. 418-9).

JUDGMENTS IN PERSONAM AS AFFECTING STRANGERS.—A judgment *in personam* is no evidence of the truth, either of the decision, or of its grounds, between strangers, or a party and a stranger, except (1) upon questions of public and general interest; (2) in bankruptcy, administration, and divorce, to a limited extent; (3) when so operating by contract or admission.

Principle.—*Against Strangers.* Such judgments, when tendered against strangers, are sometimes said to be excluded as opinion evidence (*R. v. Fontaine Morceau, sup.*); sometimes as hearsay (Steph. art. 14), though it may be remarked that even if the judge were called as a witness he would not be competent either to pronounce or to prove his judgment; but more commonly as *res inter alios acta* (*ante*, 43-4), it being unjust that a man should be affected, and still more that he should be bound, by proceedings in which he could not make defence, cross-examine, or appeal. *For strangers against parties.* Judgments *in personam* are not evidence for a stranger even against a party, because their operation would thus not be *mutual*.

EXAMPLES.

Admissible.

A. sues B. for trespassing upon his land, B.'s defence being that the land was part of a highway;—a previous conviction against A. for nuisance in obstructing the highway at the spot in question is *prima facie* evidence that such spot was part of the highway (*Petrie v. Nuttall*, 11 Ex. 569; *ante*, 51).

A. recovers a judgment for debt against B., who afterwards becomes bankrupt;—the judgment is *prima facie* evidence of the debt against B.'s trustee and creditors (*Exp. Anderson, re Tollemache*, 14 Q. B. D. 606). Judgments are also evidence of debt in administration proceed-

Inadmissible.

A. sues B., his servant, for negligently injuring C.'s horse. A judgment recovered by C. against A. for such injury is not admissible to prove B.'s negligence [*Green v. New River Co.*, 4 T. R. 590. *Aliter* to show the amount recovered by C.; *ante*, 125].

On the trial of A. as accessory to a felony committed by B., the conviction of B., though admissible to prove that fact, is no evidence of B.'s guilt. [See *R. v. Turner*, 1 Moo. C. C. 347; 1 Lewin, 121; Steph. art. 44 illustr. d.]

Admissible.

ings (*Harvey v. Wilde*, 14 Eq. 438).

In an administration action in Chancery, A. acquiesces in the distribution of the funds. A. is barred thereby from afterwards applying to revoke the Letters of Administration (*Mohan v. Broughton*, 1900, P. 56).

A. petitions for divorce by reason of his wife's adultery with B., the petition being dismissed on the ground of A.'s own adultery; this dismissal is conclusive to prove A.'s adultery in a second petition against his wife for adultery with C., in which suit (neither the wife nor C. appearing) the Queen's Proctor had intervened (*Conradi v. Conradi*, L. R. 1 P. & D. 540).

A pleads guilty to a crime and is convicted; the record of judgment upon this plea is admissible against him in a civil action, as a solemn judicial confession of the fact (*R. v. Fontaine Moreau*, 11 Q. B., p. 1023).

Inadmissible.

A. obtains a decree *nisi* for a divorce against his wife, who had pleaded, but failed to prove, A.'s adultery. This decree does not debar the Queen's Proctor from proving A.'s adultery on an intervention in which the Queen's Proctor alleges the same charges against A., supported by fresh evidence (*Harding v. Harding*, 34 L. J. Mat. 129; *Gladstone v. Gladstone*, L. R. 3 P. & D. 260).

A. pleads not guilty to a crime, but is convicted;—the record of judgment upon this plea is not receivable against A. in a civil action as an admission to prove his guilt (*R. v. Warder of the Fleet*, 12 Mod. 339; *ante*, 125).

DEPOSITIONS IN FORMER TRIALS.—At Common Law, testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided—(1) That the proceedings are between the *same parties* or their privies; (2) that the *same issues* are involved; (3) that the party against whom, or whose privy, the evidence is tendered had on the former occasion a *full opportunity of cross-examination*; and (4) that the witness is *incapable of being called* on the second trial, *i.e.*, is dead, insane, seriously ill, kept out of the way by the opposite side, or (in civil cases only) is out of the jurisdiction, or cannot be found after diligent search [336-340].

Principle.—The admission of such evidence has been thought (1) to form an exception to the hearsay rule

(Steph. art. 32); but since both oath and cross-examination were present, the essential requirements of that rule are satisfied (*ante*, 60-1). Indeed, in *Wright v. Tatham*, 1 A. & E. p. 22, Tindal, C.J., remarked that such evidence was "of as high a nature, and as direct and immediate, as *vivâ voce* testimony."—Its weight, however, is of course affected by the loss of the demeanour of the witness. (2) Mr. Taylor considers it admissible as an exception to the rule excluding secondary evidence, holding that that rule excludes secondary evidence not only of documents but of oral testimony (s. 464; *sed qu.*). (3) Dr. Wharton bases its admission on the consideration that the parties and the issues being the same, and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first (s. 177).

The conditions of admissibility, it will be seen, are analogous to those relating to judgments; and indeed whenever a decree in one case would be evidence of the facts decided when tendered in another, there the testimony of a witness in the former trial who was liable to cross-examination, but is incapable of being called, is receivable. So, as to mutuality, the evidence is not admissible for, unless it would also be admissible against, a party (*Morgan v. Nicholl*, L. R. 2 C. P. 117). Where, however, any of the four conditions above-mentioned is absent the evidence will be rejected as *res inter alios acta* (*ante*, 43, 131); though it may of course, be receivable on other grounds, *e.g.*, as an admission, or to contradict the same witness on the second trial, or (after the deponent's death) to prove public rights or pedigree.

Proof of, and objections to, the former Testimony.

—The testimony, if *oral*, may be proved from memory or notes, by any one who can swear to its accuracy, though not, unless at least by consent, by the *judge's notes* (*Conradi v. Conradi*, L. R. 1 P. & D. 514); and, if *written*, by office, certified, or examined copy. And it is open to the same objections as to hearsay, leading questions, and statements of the contents of unpro-

duced documents, as if the witness were personally present.

EXAMPLES.

Admissible.

In an action by A. against D., the depositions of a witness, since deceased, taken in a prior action involving the same question, and brought by A. B. and C. jointly against D., are admissible (*Wright v. Tatham*, 1 A. & E. 3).

So, in an action by A. as heir-at-law of B. to recover certain land from C., the depositions of a witness, since deceased, taken in a prior action by A. as heir of B., against C., to recover different lands, are admissible (*Doe v. Derby*, 1 A. & E. 791 n.).

A. sues B., C., and D., and also, in another action, C., D., and E. The facts in both actions are the same, but the relief claimed is different. Held, that A. might, on notice, read in the second action the affidavits and depositions taken in the first, against such defendants as were common to both (*Brown v. White*, 24 W. R. 456).

A. sues B. for damages for a collision at sea caused by the negligence of B.'s servants. The deposition of a witness taken before the Coroner, on an inquest on A.'s son, whose death was caused by the collision;—Held admissible for B., the deponent being out of the jurisdiction (*Sills v. Brown*, 9 C. & P. 601; *sed qu. cp. post*, 145).

Inadmissible.

In an action by A. to recover land from C.'s son; the depositions of a witness, since deceased, taken in a former action brought by A.'s son as heir-at-law of A. (whom he supposed to be dead) against C. to recover the same land, are inadmissible, as A. did not claim through B., though B. claimed through A.; and the evidence not being admissible against, could not be admissible for, A. (*Morgan v. Nicholl*, L. R. 2 C. P. 117).

A., a shareholder, being sued by a company for calls, pleads misrepresentation. Depositions taken in a prior action by the company against B., another shareholder, for calls, in which B. had also pleaded misrepresentation, are not admissible against the company either at common law, or under O. 37, r. 3 (*Printing Co. v. Drucker*, 1894, 2 Q. B. 801).

A., the widow of B., sues C., B.'s employer, under Lord Campbell's Act, for damages for B.'s death. At the trial, a transcript of the proceedings before the Coroner was, by consent, put in. Held, the depositions were inadmissible and could only be used to cross-examine the deponents (*Cal-menson v. Merchants' Warehousing Co.*, 65 Sol. Jo. 341, H. L.; *cp. post*, 145).

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART II.—WITNESSES.

CHAPTER XXII.

COMPETENCY. COMPELLABILITY. OATH AND
AFFIRMATION.

[449-463.]

COMPETENCY.—Formerly, the parties, their consorts, and any other person having a pecuniary *interest* in the case, as well as *atheists*, and those convicted of *crime*, were incompetent as witnesses. Now, however, with the two exceptions stated below, all persons are competent to give evidence, and the above considerations merely affect the weight, and not the admissibility, of the testimony.

Objections to competency used to be decided by the judge on the *voir dire* (i.e., *vrai dire*), the witness being sworn to answer truly all such questions as the Court should demand of him; but the modern practice is either to interrogate the witness before swearing him, or to elicit the facts upon the examination in chief, when, if his incompetency appears, the evidence will be rejected (*R. v. Whitehead*, L. R. 1 C. C. R. 33).

(1) **Incompetency from Defective Intellect.**—No witness is competent who is prevented from *infancy*, *lunacy*, *drunkenness* and the like, from understanding the nature of an oath, and from giving rational testimony.

But the incapacity is only co-extensive with the defect; thus, a lunatic is competent during a lucid interval, a mono-maniac upon all subjects save the one, a drunkard upon his return to sobriety. And where the incapacity is merely temporary the judge may, in his discretion, provided the application be made before the jury are sworn, postpone the trial until it is removed.

(2) **Incompetency in Criminal Proceedings.**—*Witnesses for the Prosecution*—In criminal proceedings the accused (*R. v. Rhodes*, 1899, 1 Q. B. 77); the wife or husband of the accused (except in the cases *infra*, 121-3); any person jointly indicted and jointly tried with the accused (*R. v. Payne*, L. R. 1 C. C. R. 349); and the wife or husband of such person (*R. v. Sheriff*, 35 L. Jo. 664; *R. v. Thompson*, L. R. 1 C. C. R. 377), are incompetent as witnesses *for the prosecution*. To render co-defendants or their consorts competent to be called by the prosecution, such co-defendants must be tried separately (*Windsor v. R.*, L. R. 1 Q. B. 390; *R. v. Sheriff*, *sup.*), or have been acquitted, or have obtained a *nolle prosequi*, or have pleaded guilty (*R. v. Tomey*, 2 Cr. App. R. 329). The wife of the prosecutor is, of course, competent and compellable either for the prosecution or the defence (*R. v. Hulton*, Jebb, C. C. 24).

Witnesses for the Defence.—By the Criminal Evidence Act, 1898 (see Appendix), which supersedes various prior statutory provisions on the subject, but does not apply to Ireland,—Every person charged with an offence, whether solely or jointly, and the wife or husband of such person is, by sec. 1, rendered a competent witness *for the defence* at every stage of the proceedings (though not before the Grand Jury, *R. v. Rhodes*, 1899, 1 Q. B. 77; nor after verdict, in mitigation of punishment, *R. v. Hodgkinson*, 64 J. P. 808). The judge ought in all cases to inform accused persons of their right to give evidence, but his failure to do so will not invalidate a conviction (*R. v. Saunders*, 63 J. P. 24). Moreover, witnesses under the Act are, unless otherwise ordered, to testify from

the witness-box (sec. 1 (g)); but their failure to give evidence is not to be made the subject of any comment by the prosecution (sec. 1 (b)), though it may be by the Court (*R. v. Rhodes, sup.*).

Evidence given under the Act is subject to the following qualifications:—

(a) *The Accused*.—By sec. 1 (a) the accused may not be called as a witness except upon his own application. By sec. 1 (e) he may, when so called, be asked any question upon cross-examination notwithstanding that it would criminate him as to the *offence charged*; but by sec. 1 (f) he may not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or charged with, any *other offence*, or is of *bad character*, unless:—

(i) The proof that he has committed or been convicted of such other offence is admissible to show that he is guilty of the offence charged [*e.g.*, proof of similar facts, if part of the same transaction under chap. V., relevant under chap. X., or corroborative under chap. XXIV., as in *R. v. Chitson, post*, 157]; or

(ii) He has personally or by his advocate asked questions of the witnesses for the prosecution to establish his own good character; or has given evidence of his good character (*ante*, 50); or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, *e.g.*, that the prosecutrix was a drunken wastrel (*R. v. Holmes*, 43 Sol. Jo. 219); or that it was a witness for the prosecution, and not the prisoner, who committed the offence (*R. v. Marshall*, 63 J. P. 36); but not that the prosecutor was a liar, for this is a mere abusive contradiction (*R. v. Rouse*, 1904, 1 K. B. 184); nor that the accused was only acting under the orders of a detective, for this was merely developing the prisoner's defence (*R. v. Bridgwater*, 1905, 1 K. B. 131, 135); or

- (iii) He has given evidence against any other person charged with the same offence (*R. v. Hadwen*, 1902, 1 K. B. 882).

(b) *The Wife or Husband of the Accused*.—By sec. 1 (c) the wife or husband of the accused may not, save in the cases mentioned below, be called as a witness in pursuance of the Act, except upon the accused's application. By sec. 4 the wife or husband of a person charged with an offence under any enactment in the Schedule to the Act may be called as a witness either by the *prosecution or defence*,* and *without the consent* of the accused; though, when so called, communications made between them during marriage are privileged (sec. 1 (d); *ante*, 57). The scheduled offences affecting England under this, or later, Acts are:—

- (i) Neglect to maintain, or desertion of, wife or family under the Vagrancy Act, 1824.
- (ii) The following offences under the Offences against the Person Act, 1861—rape (s. 48); indecent assault (s. 52); abduction of women or girls (ss. 53-55; sections 49-51 have been repealed); also in bigamy, but not the further offences mentioned, the wife can be called without the prisoner's consent (*Cr. Just. Am. Act*, 1914, s. 28; *R. v. Green*, 63 J. P. 745)].
- (iii) Theft by husband or wife of each other's property under the Married Women's Property Act, 1882, ss. 12, 16. [Amended by the Married Women's Property Act, 1884, s. 1, under which either is, except when defendant, a *compellable* witness (*post*, 140)].
- (iv) Offences against women and girls under the Criminal Law Amendment Act, 1885 (whole Act).
- (v) Offences against children under the Prevention of Cruelty to Children Act, 1894. [This Act

* This probably means not that a prisoner's wife may be called for his defence without his consent, but that he may call the wife of his co-defendant without such co-defendant's consent (see *Spouse-Witnesses*, by Herman Cohen, pp. 18-19, and Appendix).

was repealed, but re-enacted with amendments, by the P. C. C. Act, 1904, by s. 12 of which the accused, or the wife or husband of the accused, is competent, but not compellable, as to offences under the Act. Other parts of the latter Act were repealed by the Children Act, 1908.]

(vi) Offences under the Incest Act, 1908.

Moreover by sec. 4 (2) nothing in the Act is to affect cases where the wife or husband of the accused may at *Common Law* be called without the latter's consent, i.e., cases of personal injury to the former caused by the violence or coercion of the latter (*R. v. Lord Mayor*, 16 Q. B. D. 775-6).

Summary.—The short effect of the above is, that the consort of the accused is only competent for the *prosecution* in (1) the *Common Law* cases of personal violence or coercion, and (2) those within the Schedule to the Cr. Ev. Act, 1898, as amended by later Acts; being compellable in the former, but not, save under the Married Women's Property Act, 1884, s. 1, *supra*, in the latter (*Leach v. R.*, 1912, A. C. 305). For the *defence*, the consort is always competent on the accused's application, but never compellable (*id.*; *R. v. Acaster*, 106 L. T. 384).

(c) *Co-Defendants and their Wives or Husbands.*—Under sec. 1, *ante*, 136-7, every person charged with an offence *jointly* with another is a competent witness *for the defence* of either, but may only be called upon his own application. When so called, he may be cross-examined, not only by the prosecution, but, if his evidence implicates his co-defendants, by the latter both generally and as to other offences and bad character under sec. 1 (c) and (f) [*R. v. Hadwen*, 1902, 1 K. B. 882; *R. v. Paul*, 1920, 2 K. B. 183].

So, by sec. 1, the consort of a co-defendant is also competent, though not compellable, for the defence. Thus, if A. and B. are jointly charged, Mrs. A. may, on A.'s application, be called for either A. or B.; and she may, probably, in the special cases scheduled in the Act be called by B. without A.'s consent (*ante*, 138).

COMPELLABILITY.—All witnesses competent to give evidence are compellable to do so; except (1) the *Sovereign*; (2) *Ambassadors* of foreign States; and (3) *prisoners and their wives*, with the qualifications, *supra*. [It is sometimes stated, *e.g.*, Wills, Ev. 2nd ed. 130-1, Cockle, L.C., on Ev. 2nd ed., 205, that the parties in Breach of Promise and Divorce proceedings are not compellable witnesses, since the Evidence Act, 1869, s. 1, uses the word “competent” only; but the contrary is clearly shown in *Nottingham v. Tomkinson*, 4 C. P. D. p. 350, and Taylor, 8th ed. ss. 1353-5.] Compellability to be sworn must, however, be distinguished from compellability when sworn to answer questions; as to privilege in the latter case, see fully *ante*, 53-9.

OATH AND AFFIRMATION.—Subject to the exceptions mentioned *infra*, oral evidence must in all cases be given under the sanction of an oath or solemn affirmation, the administration of which will vary according as the witness has, or has not, a religious belief.

Believers.—When it appears that a witness has a religious belief he must either be *sworn* (in the usual way, or some other that he declares to be binding upon him, see *infra*, Form of Oath); or “if he objects to be sworn, and states as the ground of such objection that the taking of an oath is contrary to his religious belief,” he will be allowed to *affirm* (Oaths Act, 1888, s. 1). It is the duty of the judge, however, to see that the statutory conditions are strictly complied with before permitting an affirmation (*R. v. Moore*, 61 L. J. M. C. 80; *Nash v. Ali Khan*, 8 Times L. R. 444); and if the witness objects on grounds other than the above, or, though not objecting to an oath, considers it not binding upon him, and will not state what form is binding, he cannot affirm (*Nash v. Ali Khan*, *supra*).

Atheists.—The testimony of an atheist is receivable (1) if he has been *sworn without objection* (Oaths Act, 1888, s. 3); or (2) “If he objects to be sworn, and states as the ground of such objection that he has no religious

belief," in which case he will be *allowed to affirm* (*ibid.* s. 1).

Form of Oath.—Oaths are binding which are administered in such form and with such ceremonies as the witness may declare to be binding (1 & 2 Vict. c. 105, s. 1); and in order to ascertain what form is so binding the judge should inquire from the witness himself before he is sworn (Tay. s. 1388).

Usual Form.—The Oaths Act, 1909, s. 2, provides that (1) The witness shall hold the New Testament, or, in the case of a Jew, the Old, in his uplifted hand and say after the officer: "I swear by Almighty God that . . .," followed by the words of the oath prescribed by law;* (2) The officer shall (unless the witness objects to, or is incapable of, so taking the oath) administer it as above without question;—Provided that where the witness is neither Christian nor Jew, the oath may be administered in any manner now lawful. If the witness so claims, he may still, as formerly, be sworn by *Kissing the Book*.

The form of *affirmation* provided by the Oaths Act, 1888, s. 2, is as follows:—"I, A.B., do solemnly, sincerely, and truly declare and affirm," and then proceed with the words of the oath prescribed by law, omitting any words of imprecation, or calling to witness.

Scotch Form.—If a witness desires to swear with uplifted hand in the form usual in Scotland, he shall be permitted to do so, without further question (Oaths Act, 1888, s. 5). In this case the witness, holding up his right hand, repeats after the officer, no book being used—"I swear by Almighty God that I will speak the truth, the whole truth, and nothing but the truth."

* The prescribed words are in civil cases :—"The evidence that I shall give to the Court (or Court and Jury) *touching the matter in question* shall be the truth, the whole truth and nothing but the truth"; in criminal cases, for the words italicised, are substituted "sworn before our Sovereign Lord the King and the prisoner at the bar" (or "Defendant," where the accused is not in custody).

Other Forms.—Roman Catholics (in Ireland) are sworn upon the New Testament with a cross upon it; Jews on the Pentateuch, with head covered; Mahomedans on the Koran; Hindoos on the Vedas; Parsees on the Zendavesta; the Chinese by breaking a saucer, with the admonition, "You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer" (The Orianada, 1907, 122 L. T. Jo. 532, *per* Bargrave Deane, J.).

Witnesses who need not Swear or Affirm.—

(1) *Children.* Under certain Acts, *e.g.*, the Children Act, 1908, s. 30, and now generally under the Cr. Just. Amdt. Act, 1914, s. 28 (2), the unsworn evidence of children of tender age is admissible when the Court is satisfied that they "do not understand the nature of an oath," but are "possessed of sufficient intelligence to justify the reception of the evidence and to understand the duty of speaking the truth." Such testimony, however, must be *corroborated*, and is *punishable if false*. As to their depositions, see *post*, 146.

(2) *Witness merely producing Documents.*—A witness called merely for the purpose of producing a document need not be sworn (*Perry v. Gibson*, 1 A. & E. 48).

(3) *Counsel and Judges.*—The evidence of counsel, when required merely to explain a case in which they have acted as such, but not otherwise, may be given from their places and without oath (*Hickman v. Berens*, 1895, 2 Ch. 638), though they may waive their privilege and be sworn, examined, and cross-examined, either in their places (*Wilding v. Sanderson*, 76 L. T. 346), or in the witness-box (*Oxley v. Pitts*, Times, Dec. 1, 1904). The same rule applies to judges (40 L. Jo. 415).

CHAPTER XXIII.

EVIDENCE TAKEN BEFORE OR AFTER TRIAL.—AFFIDAVITS,
COMMISSIONS, DEPOSITIONS, INTERROGATORIES.

[495-513.]

CIVIL CASES. Before Trial.—In civil proceedings, evidence may be given *before* trial in the following cases and manner:—

Affidavits. Commissions. (1) *By Agreement.*—The parties may agree to try their case, either wholly or in part, upon affidavit (O. 37, r. 1; O. 38, rr. 25-30). Such an agreement is equivalent to a consent to try before a judge alone (*Brooke v. Wigg*, 8 Ch. D. 510); but either party may require the production of an affidavit witness at the trial for cross-examination, failing which the affidavit will be rejected. Moreover the Court itself, where the affidavits are unsatisfactory, or the interests of justice require it, may exclude the affidavits and order the witnesses to be examined orally (*Lovell v. Wallis*, 53 L. J. Ch. 494). (2) *By Order of the Court.*—The Court or a judge may at any time, for sufficient reason, order (a) that *any particular fact or facts may be proved by affidavit*; or, (b) that *the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or a judge may think reasonable*; or (c) that *any witness whose attendance in Court ought, for some sufficient cause, to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or a judge that the other party bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced, no order shall be made authorizing the evidence of such witnesses to be given by affidavit* (O. 37, r. 1; Adminstr. of Just. Act, 1920, s. 15).

Depositions De Bene Esse.—Where a witness is about to go abroad, or from age, illness, or infirmity is unlikely to be able to attend the trial, he may be examined on oath before an officer of the Court; but, unless otherwise provided or directed, his depositions cannot be given in evidence without the consent of the opposite party unless the witness is *dead* or *beyond the jurisdiction*, or incapacitated from attending by *sickness* or *other infirmity* (O. 37, rr. 5, 18; *Warner v. Mosses*, 16 Ch. D. 100).

Interrogatories.—Under O. 31, r. 1, the plaintiff or defendant, in any cause or matter not of a penal nature, may by leave (and in actions for fraud or breach of trust without leave) deliver interrogatories in writing for the examination of the *opposite party* (*i.e.*, one between whom and the applicant an issue is joined, and not a mere third party) as to any matter in question between them, but not as to matters which would be admissible only in cross-examination (*Kennedy v. Dodson*, 1895, 1 Ch. 334). And by O. 31, r. 24, any party may at the trial use in evidence any one or more of the answers, or any part of an answer of the opposite party, without putting in the others, or the whole of such answer, *provided* always that the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the latter ought not to be used without them, he may direct them to be put in.

After Trial.—All evidence taken, or used, at the hearing of a case, may be used in any subsequent proceedings in the same case (O. 37, r. 25; O. 38, r. 21); and evidence taken *subsequently* to the hearing shall be taken as nearly as may be to evidence taken thereat (O. 37, r. 21).

CRIMINAL CASES.—In criminal proceedings oral evidence taken before the trial is admissible thereon in the cases mentioned below.

Depositions before Magistrates and Coroners.—*Witnesses for the Prosecution.*—By 11 & 12 Vict. c. 42 (Jervis' Act), s. 17, it is provided that in all indictable cases, the witnesses for the prosecution are to be

examined on oath and in the presence of the accused, before a justice of the peace; that their depositions are to be read over to them and signed by them and by the justice; and that afterwards, upon the trial of the accused, if it be proved (1) that the *deponent be dead, or so ill as to be unable to travel*; and (2) that the accused or his counsel or attorney had *full opportunity of cross-examining the deponent*; then (3) if the deposition *purport to be signed by the justice taking it*, the deposition shall be admissible in evidence, unless proved not in fact to have been signed by such justice. *Witnesses for the Defence.*—By 30 & 31 Vict. c. 35 (Russell Gurney's Act), s. 3, similar provisions apply to depositions by witnesses for the defence.

So, under the Coroners Act, 1887, s. 4, the depositions of witnesses taken before him are evidence against the accused in cases of murder or manslaughter, (1) if the witness is dead, etc.; (2) if the deposition is *signed by the witness and the coroner*; and (3) if the accused was present and had *full opportunity of cross-examination* (*R. v. Cowle*, 71 J. P. Rep. 152; *R. v. Butcher*, 64 *ibid.* 808). Hearsay and other inadmissible matter therein will, however, be excluded (*R. v. Cowle, supra*). As to their admissibility in other cases, see *ante*, 134.

Depositions to Perpetuate Testimony.—By 30 & 31 Vict. c. 35 (Russell Gurney's Act), s. 6, it is provided that when any person able and willing to give information as to an indictable offence is *dangerously ill* and in the opinion of some registered medical practitioner *not likely to recover*, and it is not practicable to take his deposition under Jervis' Act, *supra*, it may be taken out of Court by a justice under the present Act. And afterwards, upon the trial of the accused, if it be proved (1) that the deponent *be dead*, or that there is *no probability that he will ever be able to travel to give evidence*; (2) that reasonable notice was served on the person (whether prosecutor or accused) against whom the evidence is to be read, and that such person or his counsel or attorney had, or might have had, if he had chosen to be present, *full opportunity of cross-examining the deponent*; then (3) if the deposition *purport to*

be signed by the justice taking it, the deposition shall be admissible either for or against the accused, as the case may be.

Under the Children Act, 1908, ss. 28-29, similar provisions apply to the depositions of children.

After Trial.—The Criminal Appeal Act, 1907, s. 9, provides for the admission of depositions taken *after* trial.

CHAPTER XXIV.

EVIDENCE TAKEN AT THE TRIAL. EXAMINATION, CROSS-EXAMINATION. RE-EXAMINATION, ETC. NUMBER OF WITNESSES. CORROBORATION.

[464-494.]

WITNESSES at the trial of any action, assessment of damages, or criminal charge, must be examined *vivâ voce* and in open court.

EXAMINATION IN CHIEF. Object and Scope of.

—After the witness has been sworn or affirmed, it is the province of the party by whom he is called to examine him in chief, sometimes called the direct examination, the object of which is to elicit from the witness all such facts as tend to prove that party's case and are within the *personal knowledge* of the witness. These may, as we have seen, be facts *in issue* or *relevant to the issue* (provided they are not excluded by public policy or privilege), and in certain cases *hearsay* and *opinions* as to such facts. With regard to *documents*, he may, as we shall hereafter see, testify to their execution and identity, but not, in the first instance, to their contents; and may prove facts, not to contradict or vary, but to interpret, their terms.

Leading Questions.—Generally a party may not, either in direct or re-examination, elicit the facts of his case by means of leading questions—*i.e.*, questions which suggest the desired answer, or which put disputed matters to the witness in a form permitting of the simple reply of “yes” or “no”; for, as the party knows exactly what his witness can prove, such evidence would obviously be open to suspicion, as being rather the prearranged version of the former than the

spontaneous narrative of the latter. Thus, a witness called to prove that A. stole a watch from B.'s shop, must not be asked, "Did you see A. enter B.'s shop and take a watch?" The proper inquiry is, what he saw A. do at the time and place in question (see *ante*, 16).

Exceptions.—The rule being merely, however, intended to prevent the examination from being conducted unfairly, the judge has a discretion (which is not open to review, *Rice v. Howard*, 16 Q. B. D. 681) to relax it whenever he considers it necessary in the interests of justice, and it is always relaxed in proving *introductory matter*, or *identification*, or *contradiction* (for here, unless the witness were asked directly whether the particular statements were made, no contradiction could be arrived at). Leading questions are also allowable if the witness is *adverse* (*infra*, 149-50); as well as to *assist his memory*, *e.g.*, where he was called to testify as to entries in the Bankruptcy List and the *Gazette*, but had only mentioned the former, he was allowed to be asked, "Was anything said about the *Gazette*?"

Refreshing Memory.—A witness may refresh his memory by any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies; but such writings are, of course, no evidence *per se* of the matters recorded. [As to refreshing the memory of *judges*, see *ante*, 8; and of *experts*, *ante*, 119.]

By whom Documents Written.—The writing may have been made either by the *witness* himself, or by *others*, if read by him when the facts were fresh and he knew them to be true. Thus, a witness may refer to his own diary, or to a newspaper report read by him at the time. So, a log-book kept by the mate, and inspected by the captain a week afterwards, is admissible to refresh the memory of either (*Anderson v. Whalley*, 3 C. & K. 54).

Contemporaneousness.—The document must have been written either at the time of the transaction, or so shortly afterwards that the facts were probably fresh in his memory (*ibid.*). A delay of a fortnight has been held not fatal (*R. v. Langton*, 2 Q. B. D. 296; 13 Cox

349); but one of several weeks (*R. v. Kinloch*, 25 How. St. Tr. 934-7), or six months (*Jones v. Stroud*, 2 C. & P. 196), will be [*Cp. ante*, 17, 88, 107].

Independent Recollection is not essential. Thus, a barrister may refer to notes on his brief, though he has forgotten all about the case (*R. v. Guinea*, Ir. Cir. R. 167); and an attesting witness, from seeing his own signature to a deed, may say he is sure that the party executed it (*Maugham v. Hubbard*, 8 B. & C. 14).

Originals and Copies.—Where the original can be produced, and the witness has no recollection of the facts otherwise than from it, a copy is inadmissible (*R. v. Harvey*, 11 Cox 546). But where the original is lost or destroyed, or the copy was verified by himself while the facts were fresh, a copy may be used (*Burton v. Plummer*, 2 A. & E. 341).

Inadmissible documents may be used for this purpose, *e.g.*, an invalid lease (*Bolton v. Tomlin*, A. & E. 836), or an unstamped writing (*Birchall v. Bullough*, 1896, 1 Q. B. 325).

Inspection and Cross-examination.—The opponent has a right to inspect only those parts of the document which refer to the subject-matter of the case (*Burgess v. Bennett*, 20 W. R. 720). And he may cross-examine thereon without making it evidence against himself, though it is otherwise if he cross-examine upon independent parts (*Gregory v. Tavernor*, 6 C. & P. 280-1).

Discrediting Party's own Witness.—Since the fact of calling a witness is supposed to represent him to the Court as worthy of credit, it is provided that a "party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove *adverse*, contradict him by *other evidence*, or by leave of the judge prove that he has made at other times a *statement inconsistent with his present testimony*; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement" (28 & 29

Vict. c. 18, s. 3). The wording of this statute would imply that the witness must also be adverse before he can be contradicted by "other evidence;" but this is not necessary (Steph. Note XLVII.) [*Post*, 151-2.]

When the Witness is Adverse.—A witness is considered adverse when, in the opinion of the judge, he bears a hostile feeling to the party calling him, and not merely when his testimony contradicts his proof (*Greenough v. Eccles*, 5 C. B. N. S. 786; Tay. s. 1426; Steph. art. 131). It is now settled that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court (*Price v. Manning*, 42 Ch. D. 372).

CROSS-EXAMINATION. Liability to.—When a witness has been intentionally called and sworn by either party, the opposite party has a right, if the examination in chief is either waived or closed, to cross-examine him. So, a defendant, whether in civil or criminal proceedings, may cross-examine a co-defendant, or any witness called by the latter, who has given evidence against him (*Allen v. Allen*, 1894, P. 248; *R. v. Hadwen*, 1902, 1 K. B. 882; see *ante*, 139).

But a witness called merely to *produce a document*, or to be *identified*, cannot be cross-examined; nor can one who has been called by *mistake* and whose examination has not substantially begun. And if a witness die, or become permanently incapacitated, before cross-examination, his evidence will be admissible, though its weight may be impaired (*R. v. Doolin*, Jebb, C. C. 123).

Object and Scope of.—The object of cross-examination is twofold—to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses. It is not confined to matters proved in chief, but may embrace all facts which are in issue or relevant, as well as those which, though otherwise irrelevant, tend to impeach credit. Leading questions may also be put. On the other hand, failure to cross-examine a witness will generally amount to an acceptance of his version of a transaction. As to the cross-examination of *prisoners*, see *ante*, 137-8.

Credit.—The credibility of a witness depends upon his knowledge of the facts—his disinterestedness—his integrity—his veracity. Proportioned to these is the degree of credit his testimony deserves from the Court or jury (Archb. Cr. Pl. 23rd ed. 403).

Under this head questions may be put to the witness in order *generally* (1) to elicit his means of knowledge, opportunities of observation, reasons for recollection or belief, and any special circumstances affecting his ability to speak to the particular case; (2) to expose the errors, omissions, inconsistencies, or improbabilities in his story; as well as (3) to probe his character, antecedents, associations, and mode of life; while, *in particular*, the following matters may also be shown:—

(4) *Previous Contradictory Statements.*—Every witness upon cross-examination in any civil or criminal proceeding may be asked whether he has made a former statement relative to the subject-matter of the case and inconsistent with his present testimony, and if he does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (28 & 29 Vict. c. 18, s. 4).

If the inconsistent statement is *in writing*, it need not be shown to the witness, or proved in the first instance; but where the intention is to *contradict* him by the writing, his attention must first be called to the parts that are to be used for that purpose; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit (28 & 29 Vict. c. 18, s. 5; *North Australian Co. v. Goldsborough Co.*, 1893, 2 Ch. p. 385). Where the *writing is lost, destroyed, or filed in another court*, secondary evidence will be admissible (Tay. ss. 1447-8).

A party's own witness may, by leave of the judge, be

similarly contradicted when, in the opinion of the judge (which is not open to review: *Rice v. Howard*, 16 Q. B. D. 681), such witness proves *adverse* (28 & 29 Vict. c. 18, s. 3) [*ante*, 149-50].

(5) *Bias*.—Facts showing that the witness is biassed or partial in relation to the parties or the cause may be elicited on cross-examination; or, if denied, independently proved (*A.-G. v. Hitchcock*, 1 Ex. R. 91), *e.g.*, that the witness is the kept mistress of the opponent (*Thomas v. David*, 7 C. & P. 350; *cp.* *Contradiction, infra*); or has quarrelled with, or expressed hostility towards the cross-examining party (*R. v. Shaw*, 16 Cox 503).

(6) *Previous Conviction*.—A witness may be cross-examined as to whether he has been convicted of any felony or misdemeanour; and if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction (28 & 29 Vict. c. 18, s. 6). This applies also to a prisoner-witness if, by asserting his good character, he has let in questions as to his previous conviction (*ante*, 50, 137-8).

(7) *Reputation for Untruthfulness*.—Independent evidence may be given that an adversary's (but not a party's own) witness bears such a general reputation for untruthfulness (or, perhaps, for moral turpitude generally: *Tay. s.* 1471) that he is unworthy of credit upon his oath. In theory, it seems such evidence should relate to general reputation only, and not express the mere opinion of the impeaching witness; but in practice the question may be shortened thus: "From your knowledge of the witness, would you believe him on his oath?" (*R. v. Brown*, 1 C. C. R. 70).

Judge may disallow Questions.—The judge may in all cases disallow any question put in cross-examination of any party or witness which may appear to him to be vexatious, or not relevant to any matter proper to be inquired into in the cause or matter (*O.* 36, r. 38; *Tay. s.* 1460; *Steph. General View of Cr. Law*, 2nd ed. 207), *e.g.*, questions as to alleged improprieties of remote

date, or of such a nature as not seriously to affect present credibility (*ibid.*); or as to the witness's religious belief (*Darby v. Ouseley*, 1 H. & N. 1); or as to disparaging comments made about him in other trials (*Seaman v. Netherclift*, 2 C. P. D. 53; though in practice these are commonly allowed).

Compulsion to answer.—A witness is compellable to answer every question put to him in cross-examination which is relevant to the issue, unless protected by *public policy or privilege*, or unless the case is one in which *oral evidence is excluded in relation to documents*. He is also in general compellable to answer questions which are irrelevant except as affecting credit; but here the judge has a discretion to excuse an answer when the truth of the matter suggested would not, in his opinion, affect the credibility of witness as to the subject-matter of his testimony (*supra*; Steph. art. 129; Tay. ss. 1460).

Contradiction.—Witnesses may be contradicted by independent evidence on all matters *relevant to the issue*; but their credit cannot be impeached by contradiction on *irrelevant* matters (and their answers thereon will be conclusive) except in the case of (1) Bias; or (2) Previous conviction for crime (*ante*, 152). Thus, where a witness, who had given his evidence through an interpreter, denied that he could speak English, it was held that the matter was collateral, and could not be contradicted (*R. v. Burke*, 8 Cox, 44). So a female witness, who denies that she is a common prostitute cannot be contradicted; though *aliter* that she is the opponent's kept mistress, for this goes to show bias (*Thomas v. David*, *ante*, 152).

Re-establishing Credit. Recrimination.—Where a witness's *reputation for veracity* has been attacked, his credit may be restored either (1) by cross-examining the impeaching witness as to his means of knowledge, hostility to the other, etc.; or (2) by general evidence that the impeached witness is worthy of credit; or (3) by general evidence that the impeaching witness is unworthy of credit,

RE-EXAMINATION.—Whenever there has been cross-examination, even upon inadmissible matters, the right to re-examine exists. This must, however, be confined to an explanation of matters arising in cross-examination, and no new facts may be introduced. Thus, where parts of a conversation had been elicited on cross-examination, *distinct* matters, though occurring in the same conversation, were rejected on re-examination (*Prince v. Samo*, 7 A. & E. 627; *cp. ante*, 64). So, an accomplice, having admitted on cross-examination, that he had committed two other robberies on the night in question, was not allowed to be asked on re-examination in whose company he was, in order to criminate the prisoner, the question not arising out of the cross-examination (*R. v. Fletcher*, 1 Lew. C. C. 111).

EXAMINATION BY JUDGE AND JURY. RE-CALLING WITNESS.—A judge may put all such questions to a witness as the interests of justice require, and may base such questions not only on matters arising in the case, but on his own local or scientific knowledge (*R. v. Antrim*, 1895, 2 I. R. 603). So, to a limited extent, may the jury. But neither judge nor jury may ask inadmissible questions (*R. v. Ratcliffe*, 14 Cr. App. R. 95; *R. v. Lillyman*, 1896, 2 Q. B. p. 177).

The judge may also, for the discovery of truth, in criminal and (with consent of all parties) civil cases, call any witness himself, especially where the jury desire it. Such witnesses may not, as of right, be cross-examined by the parties; but where material evidence is given against either, leave should be given to that party to cross-examine (*Re Enoch*, 1910, 1 K. B. 327, C. A.). And he may at any stage of the trial, either at his own instance or that of a party, *recall* a witness for further examination or cross-examination.

NUMBER OF WITNESSES. CORROBORATION.

—As a general rule, Courts may act on the testimony of a single witness, even though uncorroborated; or, upon duly proved documentary evidence, without such testimony at all (*Wright v. Tatham*, 5 C. & F. 592-3).

But whenever there are circumstances of suspicion, or the testimony of a witness is challenged by cross-examination or otherwise, corroboration is allowed; and in certain cases no verdict can be obtained without it. On the other hand, Courts have inherent power to check an undue multiplicity of witnesses (Best, ss. 47-8).

Exceptions.—To the rule that a single uncorroborated witness will suffice, there are the following exceptions:—(1) **Treason.** In trials for high treason, or misprision of treason (other than compassing the Sovereign's death) two witnesses are essential, either both to the same overt act, or one to one, and another to another overt act of the same treason (Tay. ss. 952-958; Steph. art. 122). (2) **Personation at Elections** must also be proved by two credible witnesses (6 & 7 Vict. c. 18, s. 88; 35 & 36 Vict. c. 33, ss. 24, 27). (3) **Perjury.** In trials for perjury the defendant cannot be convicted solely on the evidence of one witness (Perjury Act, 1911, s. 13). So, in cases of (4) **Breach of Promise**, the testimony of the plaintiff must be corroborated by "some other material evidence in support of such promise" (32 & 33 Vict. c. 68, s. 2); and (5) in **Bastardy** that of the mother "in some material particular by other testimony to the satisfaction of the justices" (8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 65, s. 4). Similar rules apply to (6) **Orders of Removal** (39 & 40 Vict. c. 61, s. 34), (7), to offences under the **Criminal Law Amendment Act**, 1885, ss. 2-4; and (8) to offences referred to in the **Children Act**, 1908, s. 30, where the proof of the offence rests on the unsworn testimony of children; a provision now made general, whenever such testimony is allowed, by the Cr. Just. Adm. Act, 1914 (*ante*, 142). Moreover (9) under the **Motor Car Act**, 1903, s. 9, a defendant may not be convicted merely on the opinion of one witness as to the rate of speed. (10) It is also a *rule of practice*, though *not of strict law*, that Courts will not act upon the uncorroborated testimony of **Claimants to the property of deceased persons** unless convinced it is true (*Rawlinson v. Scoles*, 79 L. T.

350); nor (11) in criminal cases upon the unsupported evidence of **Accomplices** (*R. v. Baskerville*, 1916, 2 K. B. 658). Where corroboration is required by law, a conviction obtained without it, will be quashed; where required merely by a rule of *practice*, although the judge *must* caution them, the jury *may* convict without it (*id.*). There must be corroboration both as to the crime and the identity of the prisoner; it must also be by independent evidence, and not merely by his own wife, or another accomplice (*R. v. Willis*, 1916, 1 K. B. 933); and, where there are several prisoners, the jury should be advised to acquit those against whom there is none. The testimony of an *informer*, *i.e.*, one who has joined a conspiracy as agent of the police, or of either *thief* or *receiver* against the other, or of children under fourteen, does not fall within the rule.

Facts admissible in Corroboration.—Facts which tend to render more probable the truth of a witness's testimony on any material point, are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated (*Wilcox v. Gotfrey*, 26 L. T. N. S. 481; *Cole v. Manning*, 2 Q. B. D. 611). But facts which are not more consistent with the truth of such testimony than the reverse, are inadmissible. The corroborative facts and evidence must, however, proceed from some one other than the witness to be corroborated (*R. v. Christie*, *post*, 157); and the question of their admissibility is one of law for the judge, and not one of fact for the jury (*Bessela v. Stern*, 2 C. P. D. p. 267; *Wiedemann v. Walpole*, 1891, 2 Q. B. pp. 537, 539; *contra*, *R. v. Gray*, C. C. R. 68 J. P. Rep. 327, *sed. qu.*)

Previous similar Statements generally inadmissible.—Formerly, the fact that a witness had made a previous statement similar to his testimony in court could always be proved to confirm his testimony (*Lutterell v. Reynell*, 1 Mod. 282, 283). But afterwards the rule was changed, and such evidence is now generally inadmissible either on direct examination to

confirm his testimony, or on re-examination to re-establish his credit when impeached by proof of a previous contradictory statement (*R. v. Parker*, 3 Doug. 242; *R. v. Coyle*, 7 Cox 74; *R. v. Coll*, 24 L. R. Ir. 522). *Exceptions*.—Such statements, however, are receivable in the following cases, not to prove the truth of the facts asserted, but merely to show that the witness is consistent with himself:—(1) Where the witness is charged with having *recently fabricated* the story, *e.g.*, from some motive of interest or friendship, it may be shown that he made a similar statement before such motive existed (*R. v. Coll*, and *R. v. Coyle*, *supra*); (2) On charges of *Rape* and similar offences against females, the fact that the prosecutrix made a complaint shortly after the outrage, together with its particulars, are admissible to confirm her testimony and disprove consent (*ante*, 28-9).

EXAMPLES.

Admissible.

A. sues B. for breach of promise of marriage. The fact that B. in the presence of C., a witness, said to A., who was attending B. in an illness, "Who has a better right to take care of me than my wife?" is admissible in corroboration of the alleged promise (*Hickey v. Campion*, 20 W. R. 752; *cp. ante*, 75).

A. is charged with carnal knowledge of B., a girl under 16. B. swore that, after the act, A. told her he had had similar relations with C. and hoped she would be as loving as C.—A. having, in the box, denied the C. incident, letters from C. to A. bearing out the imputation;—Held admissible, under the Cr. Ev. Act, 1898, s. 1, to corroborate B.'s testimony and prove A.'s guilt (*R. v. Chitson*, 1909, 2 K. B. 945, cited *ante*, 137; *R. v. Lovegrove*, 1920, 3 K. B. 643).

Inadmissible.

A. sues B. for breach of promise of marriage. Letters by B. to A. expressing affection and admiration for her, and using terms of endearment, but containing no reference to marriage, are not admissible in corroboration, being equally consistent with B.'s having no intention to marry A. (*Kempshall v. Holland*, *Times*, Nov. 14th, 1895).

A. is charged with indecently assaulting B., a boy of 5. The fact that, shortly after the assault, B., in A.'s presence, made a statement to a constable of the details of the assault, is not admissible to corroborate B.'s subsequent testimony at the trial, whether his former statement be proved by himself, or by other witnesses (*R. v. Christie*, 1914, A. C. 545, cited *ante*, 75).

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART III.—DOCUMENTS.

CHAPTER XXV.

AUTHORSHIP AND EXECUTION: HANDWRITING, SEALING,
DELIVERY, ATTESTATION. ANCIENT DOCUMENTS.
ALTERATIONS AND BLANKS. STAMPS.

[514-532.]

PUBLIC AND JUDICIAL DOCUMENTS.—The execution of *public* and *judicial* documents will be more fully considered when dealing with their contents (*post*, Chap. XXVI.), since in most of the statutes providing for their proof the two subjects are treated together. It will suffice, here, therefore, to say that certain of such documents (*e.g.*, Acts of Parliament) being judicially noticed are admissible without any authentication whatever; while others need no further authentication than that of appearing in a Government Gazette, or “purporting” to be printed by the official printers, or “purporting” to be certified, stamped, sealed, or signed by certain officers or departments,—the effect being to render such documents *primâ facie* admissible so far as their genuineness and validity go, and to throw upon the opponent the onus of impeaching them if he can.

PRIVATE DOCUMENTS.—The execution of private documents, whether produced or not, whose

proof has not been dispensed with as provided, *ante*, 7, may be proved as follows:—

Handwriting and Signature.—The handwriting and signature of *unattested* documents, or of attested ones not legally requiring attestation (*infra*), may be proved by calling (1) *the writer*; or (2) a witness who *saw the document signed*; or (3) a witness who has acquired a *knowledge of the writing* in any of the three ways mentioned *ante*, 122; or by (4) *comparison* of the document in dispute with others proved to be genuine as provided *ante*, 26-7; or by (5) the *admissions* of the party against whom the document is tendered; the above methods being all equally primary and equally admissible. As to *lost documents*, see *post*, 160.

Mode of Signature.—Moreover, even where signature is required by statute and for solemn documents, a manual signing is not generally essential, any form in which a person affixes his name, with intent that it shall be treated as his signature, being sufficient; *e.g.*, deeds or wills are valid if signed by mark, stamp, or initials.

Sealing and Delivery.—Signature, though usual, is not necessary to the validity of a deed, unless under a power requiring it, and forms no part of the execution. But where signature is proved, and the attestation clause is in the usual form, sealing and delivery may be presumed.

To constitute *sealing*, neither wax, nor wafer, nor a piece of paper, nor even an impression is necessary (*Re Sandilands*, L. R. 6 C. P. 411); providing that, from the testimony or circumstances, sealing may, in fact, be inferred (*Natl. Prov. Bank of England v. Jackson*, 33 Ch. D. 1; *Re Balkis*, 58 L. T. 300). *Delivery* is essential to a deed, and the deed takes effect therefrom. No particular form, however, is necessary. Thus, throwing it on the table with intent that the other should take it up, or treating it as one's own, is sufficient.

Attestation.—When a document (1) is *required by law to be attested*, it must (subject to the exceptions mentioned below) be proved by calling the attesting

witness, even though the document itself be lost, cancelled, or destroyed. If there are several such witnesses, one only need be called; but the absence of all must be explained before other evidence can be received. Where, however, the witness denies the execution (*Bowman v. Hodgson*, L. R. 1 P. & D. 362), or refuses to testify (*Re Owens*, 29 L. R. I. 451), other evidence will be admissible. Where the attesting witness is *dead, insane, beyond the jurisdiction, or cannot be found*, secondary evidence of execution must be given by proof of his *handwriting*; or if (but only if) this is not obtainable, by presumptive or other evidence (*Clarke v. Clarke*, 5 L. R. I. 47; Steph. art. 66). When the document is *lost* and the names of the witnesses are unknown, the execution may be proved by the recollection of witnesses (*Re Phibbs*, 1917, P. 93), by admission, or otherwise, *e.g.*, by the parties having *acted* on the document (*R. v. Fordingbridge*, 27 L. J. M. C. 290), as if there were no attesting witness. And when (2) *attestation is not legally required*, similar proof to the last-mentioned may, as with unattested documents, also become admissible (28 & 29 Vict. c. 18, ss. 1, 7; *ante*, 159).

When attesting witness need not be called.—Even though attestation be required by law, and the attesting witness be available, he need not be called when (1) the document is *ancient, i.e.*, thirty years old (*infra*); or (2) its execution has been *admitted for the purposes of the trial* (*ante*, 7); or (3) the document is in the *possession of the adversary* who refuses to produce it on notice (*Cooke v. Tanswell*, 8 Taunt. 450); or who, though producing it, claims an interest under it in the subject-matter of the cause (*Pearce v. Hooper*, 3 Taunt. 60) or who, if a public officer bound by law to procure its execution, has already treated it as valid (*Plumer v. Briscoe*, 11 Q. B. 46).

Ancient Documents. Proper Custody.—Documents *thirty years old*, produced from *proper custody*, and otherwise free from suspicion, prove themselves, and no evidence of their execution need be given, though the witnesses attesting them be alive and in Court. The

proper custody of a document means its deposit with a person and in a place where it might naturally and reasonably be expected to be found, if authentic, even though there be some other custody more strictly proper (Tay. ss. 659-664). Thus, the proper custody of parish registers is with the incumbent or in the church, and not, unless explained, with the parish clerk (*Doe v. Fowler*, 14 Q. B. 700); and that of family Bibles with a member of the family (*Hubbard v. Lees*, L. R. 1 Ex. 255). On the other hand, an ancient grant, produced from the British Museum, and not from the custody of persons interested in the property, has been rejected (*Swinnerton v. Stafford*, 3 Taunt. 91).

Alterations. Blanks.—Unless made with the privity of the party charged, any *material* alteration made in a deed or written contract, after its execution, and while in the control of the party enforcing it, even though made without the latter's knowledge or assent, renders the instrument void (*Davidson v. Cooper*, 13 M. & W. 343). In the absence of evidence, however, alterations in *deeds* are presumed to have been made before execution (*Doe v. Catmore*, 16 Q. B. 745), those in *wills* after execution (*Doe v. Palmer*, *ibid.* 747).

Blanks.—Immaterial matters (*e.g.*, a mere Christian name) may, by consent, be filled in after the execution of a deed; but not essential ones (*e.g.*, the name of a transferee of shares, or their number), as to which the deed must, after their insertion, be redelivered, or will be void (*Powell v. London and Provincial Bank*, 1893, 2 Ch. 555).

Stamps.—Except in criminal proceedings, no instrument requiring a stamp “shall be given in evidence, or be available for any purpose whatever,” unless (1) it is duly stamped in accordance with the law in force at the time when it was first executed; or (2) if the instrument is one which may be legally stamped after its execution, unless on payment to the officer of the Court of the unpaid duty, together with the penalty payable on stamping the same, and of a further sum of one pound (Stamp Act, 1891, s. 14). Stamp objections are now taken by the Court (*ibid.*), and cannot be

waived by the parties (*Bowker v. Williamson*, 5 T. L. R. 382).

No new trial (O. 39, r. 8), or appeal (*Blewitt v. Tritton*, 1892, 2 Q. B. 327), is allowed where the judge has ruled that a stamp is sufficient, or not required. But his ruling is final only when he decides that the instrument is admissible (*ibid.*).

Where a document requiring a stamp is lost, or not produced upon notice, it will, in the absence of evidence to the contrary, be presumed to have been duly stamped; but where it is shown to have been unstamped, it will be presumed to have so continued until the contrary is proved (*Closmadeuc v. Carrel*, 18 C. B. 36).

CHAPTER XXVI.

CONTENTS OF DOCUMENTS GENERALLY: PRIMARY AND SECONDARY EVIDENCE. CONTENTS OF PARTICULAR DOCUMENTS: PUBLIC, JUDICIAL, AND PRIVATE.

[533-565.]

THE contents of public or judicial documents, may, in general, be proved either by primary or secondary evidence; the contents of private documents must be proved by primary evidence, except in the cases mentioned *post*, 166-7.

PRIMARY EVIDENCE.—Primary evidence of the contents of a document may be given in the following forms:—

(1) **Production of the Original Document.**—When an original document is produced it must, unless it has been admitted, or is a public document receivable on its mere production, be identified on oath as being what it purports to be. *Duplicate Originals* are each primary evidence; *Counterparts* are primary against an executing, but secondary only against a non-executing, party. The original of a *telegram* is the one sent, not the one received.

How procured.—When a party desires to obtain an original document which is in the hands of: (1) *his opponent*, the latter may be served either with a notice to produce (*post*, 167), under which production is optional; or with a subpoena duces tecum, under which it is compulsory. When it is in the hands of (2) *a stranger*, a subpoena is the proper process, except in the case of judicial documents, or bankers' books, when a judge's order is necessary. In criminal cases, however, the prosecutor, not being strictly a party (*ante*,

128), must be subpoenaed to produce any necessary documents in his possession; while in the case of the prisoner the proper process is a notice to produce, and not a subpoena (Archb. Cr. Pl. 24th ed. 375).

(2) **Admissions.**—Admissions of the contents of a document made either orally, in writing, or by conduct, by a *party*, are primary evidence against him, without notice to produce, or accounting for the absence of, the original, such proof not being open to the same objections as is parol evidence from other sources; while the sworn testimony as to its contents of witnesses who are strangers, is only secondary evidence (*Slatterie v. Pooley*, 6 M. & W. 664). So, copies, though usually only *secondary* evidence, may become *primary* by having been delivered by a party to his opponent as correct, or otherwise dealt with by him as true (*Price v. Woodhouse*, 3 Ex. 616).

(3) **Copies made under Public Authority.**—In a few cases copies of an original document made under public authority are receivable as primary evidence thereof. Thus, probate of a will of personalty, is primary evidence of the will, the original will not being even admissible for this purpose (*Pinney v. Hunt*, 6 Ch. D. 98); while, where proof is required of the declaration of a testator, the will is primary evidence and the probate secondary only (*ante*, 96).

SECONDARY EVIDENCE. Forms of Secondary Evidence.—The following are the various forms in which secondary evidence of the contents of documents may be tendered, the enumeration given in Stephen's Digest, art. 70, being too limited:—

(A) **Copies**, which may be (1) *Government Printers*, or *Government Gazette*, copies. (2) *Exemplifications* (now obsolete), *i.e.*, copies of a record set out either under the Great Seal, or the seal of the Court in which the record is preserved. (3) *Examined copies*, *i.e.*, those sworn to be true by a witness who has examined them line by line with the originals, or who has examined the copy while another person read the original. Examined copies are the original and legitimate common law method of proving every species of

document, but are not usually employed where the simpler means of office or certified copies are available. (4) *Office copies*, i.e., copies of judicial documents made by the officer having charge of the originals, and sealed with the seal of the office. Office copies of all writs, records, pleadings, and other documents filed in the High Court are admissible therein to the same extent as the originals (O. 37, r. 4); but copies made by officers of other courts are only admissible in the same court and cause. (5) *Certified copies*, i.e., those signed and certified as true by the officer to whose custody the original is entrusted. If *purporting* to be verified in the manner provided by the statutes which render them admissible, they may be given in evidence without proof of the seal, signature, or official character of the party verifying them (Documentary Evidence Act, 1845, s. 1). Certified copies are the usual means of proving non-judicial public documents, e.g., registers. (6) *Printed, lithographed, or photographed copies*, are primary evidence of each other's contents, but secondary evidence only of the common original. (7) *Drafts, Abstracts, and Memorials*, are also sometimes received as secondary evidence of deeds, even against strangers.

What Copies appropriate.—In the absence of specific provision, the proper means of proving the contents of public documents is by *certified* copy, and of judicial document by *office* copy; but in many cases alternative means are also provided by statute (*infra*, 167-171). The proper means of proving private documents is by production, or failing this, *examined* copy.

(B) **Oral Testimony.**—Secondary evidence of private, but not generally of public or judicial documents (*post*, 166), may also be given by the testimony of witnesses who have read them; or by—

(C) **Presumptive Evidence**, e.g., by the parties interested having acted in accordance with the tenor of the document (*R. v. Fordingbridge*, 27 L. J. M. C. 290); or by the—

(D) **Statements or Entries by Deceased Persons**, admissible under exceptions to the hearsay rule.

Thus, an entry against interest made in a rent-book by a deceased landlord has been received as secondary evidence of the contents of a lost lease (*Connor v. Fitzgerald, ante*, 86); and a copy made in the course of duty by a deceased clerk to a solicitor, as secondary evidence of a lost will (*Sly v. Sly, ante*, 89). So, also, for the latter purpose, the declarations of the testator are admissible, not strictly as an exception to the hearsay rule, but as original evidence (*Sugden v. St. Leonards, ante*, 104).

Inadmissible Forms. Copies of Copies.—On the other hand, copies of copies are not generally receivable; though if the second be compared with the first and the first with the original, this objection goes only to weight and not admissibility (*Lafone v. Griffin*, 25 T. L. R. 308; *Re Halifax*, 79 L. T. 183, 536). Nor can a document be proved by a witness who merely heard what purported to be its contents read out in a former trial (*Doe v. Ross*, 7 M. & W. 102).

No Degrees of Secondary Evidence.—Formerly, when the "Best Evidence" rule prevailed, secondary evidence was strictly marshalled according to degree, i.e., counterparts, then copies, then abstracts, then parol evidence. Now, however, all classes are in general equally admissible, subject to observation where more satisfactory proof is withheld (*Doe v. Ross*, 7 M. & W. 102). There is an exception to this in the case of *public or judicial documents*, the contents of which are provable by copies and not by oral evidence (*Breton v. Cope*, 1 Peake, 43; Best, s. 485; *ante*, 165).

Cases in which Secondary Evidence is Admissible.—Secondary evidence of the contents of documents may, provided the originals themselves would be admissible, be given in the following cases: (1) *When the Original is a Public or Judicial Document, or a private one required to be registered or enrolled.* (2) *When the original has been lost or destroyed; but execution and (where lost) search must first be proved independently.* (3) *When its production is physically impossible or highly inconvenient, e.g., in the case of tombstones,*

public registers, or documents in foreign countries.

(4) *When the original is in the possession of a stranger* who refuses to produce it, and is not compellable by law to do so, *e.g.*, when it is a title-deed, incriminating document, or one which he holds as trustee, solicitor, or mortgagee for another. (5) *When the original is in the possession of the adversary*, who refuses to produce it either after *Notice to Produce*, or when such notice is excused.

Notice to Produce.—The object of a notice to produce is to enable the adversary to have the document in court, and if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original (*Dwyer v. Collins*, 7 Ex. 639, 647). If the document is produced and inspected or used by the party calling for it, he thereby makes it his own evidence (*Sayer v. Kitchen*, 1 Esp. 210); if not produced, the non-producing party cannot afterwards use it (*Edmonds v. Challis*, 1 C. B. 413).

Notice to produce is excused when (a) the document is itself a notice served on the adversary; or (b) where from the nature of the case the adversary is charged with its possession, *e.g.*, an action to recover the document, or a charge of stealing it; or (c) where the adversary has it in Court, or has himself admitted its loss.

PUBLIC DOCUMENTS. Statutes.—Public Statutes and all others passed since February 14, 1851, are judicially noticed without evidence unless the contrary is expressly declared (52 & 53 Vict. c. 63, s. 9). Colonial Statutes, and orders and regulations thereunder, are provable by copies purporting to be printed by the Government printer of the colony (7 Ed. VII. c. 16, s. 1; *Gibson v. G.*, 37 T. L. R. 124). Foreign law, written or unwritten, must be proved as matter of fact to the judge, by experts (*ante*, 6, 8, 117).

Treaties, Charters, Letters-Patent, &c.—Treaties, charters, Crown grants, pardons, and commissions are provable by production, or examined copy (Tay. s. 152*ff.*). Letters-patent sealed with the seal of the

Patent Office are judicially noticed, and certified and sealed copies thereof are also admissible (46 & 47 Vict. c. 57, ss. 84, 89). Colonial or Foreign public proceedings are provable by examined copy, or copy purporting to bear the seal of the colony or state (14 & 15 Vict. c. 99, s. 7).

Proclamations and Orders in Council are provable, not only by the Common Law methods of production or examined copy, but also by Gazette copy, Government printer's copy, or copies purporting to be certified by the heads, secretaries, or assistant secretaries, of the particular public Board or Department involved (Documentary Ev. Act, 1868, s. 2).

Parliamentary Journals are provable by copies purporting to be printed by the Government printers (8 & 9 Vict. c. 113, s. 3).

The General Records of the Realm in the custody of the Master of the Rolls are provable by copies certified by the deputy-keeper of the records, or one of the assistant keepers, and purporting to be sealed with the seal of the Record Office (1 & 2 Vict. c. 94, ss. 12-13).

Official Certificates, Corporation Books, Public Registers.—It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, by-laws, entries in registers and other books shall be receivable in evidence of certain particulars in courts of justice, provided they are respectively authenticated in the manner prescribed by such statutes. Whenever by any Act now or hereafter in force any such certificate, &c., is so receivable, it is admissible if it *purports* to be authenticated in the manner prescribed, and no proof need be given of the stamp, seal, or signature, or of the official character of the person appearing to have signed the same (8 & 9 Vict. c. 113, s. 1). And whenever any book or other document is of *such a public nature as to be admissible in evidence on its mere production from the proper custody*, and no statute exists which renders its contents provable by means of a copy, any copy thereof

or extract therefrom shall be admissible provided it be *proved* to be an examined copy or extract, or *purport* to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted (14 & 15 Vict. c. 99, s. 14).

English Registers are provable, as above, by copies purporting to be duly certified. Indian registers, by copies deposited at, and produced from, the India Office (*Westmacott v. W.*, 1899, P. 183). Foreign registers by examined or certified copy (*Burnaby v. Baillie*, 42 Ch. D. 282; *Lyell v. Kennedy*, 14 App. Cas. 437). As, however, production of an original register cannot be enforced, the *handwriting* of an entry may be proved, without it, by oral testimony (*Sayer v. Glossop*, 2 Ex. 49). As to proof of *Bank Books*, see *ante*, 114-5.

Inquisitions, Surveys, Assessments, By-Laws, Manor-Books.—*Inquisitions* and *Surveys* seem, notwithstanding 14 & 15 Vict. c. 99, s. 14, *supra*, to be provable by production of the original from proper custody and not generally by copies, unless the originals have been lost or destroyed (*Tay. ss.* 1582, 1585). *Assessments* of land-tax, poor-law valuations in Ireland, and poor-rate books, are provable by production, or examined or certified copy under 14 & 15 Vict. c. 99, s. 14. *By-Laws* under the Companies Clauses Consolidation Act, 1845, s. 127, by copies purporting to be sealed with the common seal of the company; and *Manor-Books* by production, or examined copy duly stamped (*Ros. N.P.* 17th ed. 120).

JUDICIAL DOCUMENTS.—Superior Courts.—Records in the Supreme Court are provable by production of the originals, for which the order of a judge or master is now necessary (O. 61, r. 28); or office copy (O. 37, rr. 2, 4). *Probates* and *Letters* by production, when the seal will be judicially noticed; or by examined or certified copy of the Act-book or register (14 & 15 Vict. c. 99, s. 14). *Bankruptcy Proceedings* by production of the order, &c., purporting to be duly signed, sealed, or certified; or by Gazette copy (*Bankruptcy Act*, 1914, s. 139; *R. v. Thomas*, 11 Cox 535).

County Courts.—By the County Courts Act, 1888, s. 28, the registrar's book kept under the Act, or copies of entries therein bearing the seal of the Court and purporting to be signed and certified as true copies by him, are evidence of the entries and proceedings referred to and of the regularity of such proceedings without any further proof. This clause does not seem to dispense with proof of the seal, though perhaps this is cured by 8 & 9 Vict. c. 113, s. 1, or 14 & 15 Vict. c. 99, s. 14; cited *ante*, 168-9.

Criminal Proceedings.—The trial and conviction or acquittal of any person charged with an *indictable offence* may, without producing the record or a copy thereof, be proved in any proceeding whatever by the certificate (or a document purporting to be such) of the clerk or other officer of the court having the custody of the records, or the deputy of either, which certificate shall contain a copy of the record omitting the formal parts thereof (14 & 15 Vict. c. 99, s. 13). A previous *conviction* may also, when required to discredit a witness (28 & 29 Vict. c. 18, s. 6), or for any other purpose (34 & 35 Vict. c. 112, s. 18), be proved by a certificate, signed as above, of the substance and effect only of the indictment and conviction, in addition, of course, to evidence of identity (*Cp. ante*, 50-1). *Summary* convictions may now also be proved by a copy of the register thereof (Cr. Just. Admin. Act, 1914, s. 28) though not by oral evidence (*Mash v. Darley*, 1914, 3 K. B. 1226, C. A.); dismissals of assault by justice's certificate (*ante*, 112), and of other charges by certified copy of the order of dismissal.

Foreign and Colonial Proceedings.—All judgments, decrees, orders, and other judicial proceedings of any court of justice in any Foreign State or British Colony, and all affidavits, pleadings and other legal documents, filed or deposited in any such court, may be proved either by examined copies, or copies purporting to be sealed with the seal of the court to which the originals belong, or, where there is no seal, to be signed by a judge of such court, who must certify that there is no

seal. If these conditions exist, no proof is required of such seal, signature or certificate, or of the official character of the judge (14 & 15 Vict. c. 99, s. 7).

Reciprocal Admissibility of Documents in England, Ireland and the Colonies.—Every document which is admissible in England or Wales in proof of any particular, without proof of the seal, stamp or signature thereof, or of the judicial or official character of the person appearing to have signed the same, is admissible to the same extent and for the same purpose in Ireland; and Irish documents are similarly admissible in England and Wales. And documents admissible in either are also admissible in the Colonies (14 & 15 Vict. c. 99, ss. 9-11; *cp.* Admn. of Just. Act, 1920, s. 9).

Affidavits, Depositions, Pleadings, Writs.—Except in cases of perjury, when the original should be produced under a master's or judge's order (O. 61, r. 28), affidavits, depositions, writs, pleadings and other documents filed in the High Court, may be proved by office copy (O. 37, r. 4; O. 38, r. 15; O. 65, r. 27, sub-ss. 53, 54). As to depositions in criminal cases, see *ante*, 132, 144-5; and in former trials, *ante*, 132-4.

PRIVATE DOCUMENTS, WHEN REGISTERED OR ENROLLED.—The contents of private documents must, as we have seen, be proved by the production of the originals, secondary evidence, *c.g.*, by examined copy, not being admissible until the absence of these is explained. Where, however, the document is required to be registered or enrolled this does not generally apply. Thus, *Wills*, except when required to prove some declaration of the testator (*ante*, 96), are provable by production of the probate (*ante*, 164); and Bills of Sale and Deeds of Arrangement by office copy (Bills of Sale Act, 1878, s. 16; Deeds of Arrangement Act, 1914, ss. 5, 6, 25).

CHAPTER XXVII.

EXCLUSION OF EXTRINSIC EVIDENCE IN SUBSTITUTION
OF DOCUMENTS.

[566-573.]

WHEN a transaction has been reduced into writing, either by requirement of law, or agreement of the parties, the writing becomes, in general, the exclusive memorial thereof, and no evidence may be given to prove the terms of the transaction, except the document itself, or evidence of its contents as provided in the last chapter.

The present rule, which excludes alternative parol proof of the terms of the transaction, even where *identical* with those of the document, must be distinguished from the rule in the next chapter which excludes extrinsic evidence to *contradict* those terms.

The two rules are sometimes loosely referred to as the “*parol-evidence*” rule (the term “*parol*” here not being confined to oral testimony, but embracing any species of evidence extrinsic to the document), and in Sir J. Stephen’s Digest they are dealt with under one head (art. 90). In his Indian Evidence Act they are more properly treated as separate rules (ss. 91-2), for it will be seen that neither the excluding principles, nor the exceptions engrafted on the rules, are really identical.

Principle.—The present rule is commonly said to be founded on the “best evidence” principle (*ante*, 12); but, like other alleged applications of that principle, it is historically much older. It has been thought to

be more properly a doctrine of the substantive law of the subjects to which it is applied, *e.g.*, in the case of a written contract that all preceding and contemporaneous oral expressions of the thing are merged in the writing or displaced by it; and in the case of wills, that the written form is essential to the thing itself (Thayer, Pr. Tr. Ev. 398; Wigmore, s. 2400).

Burden of Proof.—The party whose witnesses show that the transaction was reduced to writing must produce, or explain the absence of, the instrument; and the opponent, in order to ascertain the fact, may either interpose in chief, or reserve the question for cross-examination, and where it is denied may at once prove the existence of the writing. If, however, the plaintiff can establish a *prima facie* case without disclosing the document, he will not be prejudiced by the defendant proving its existence, for the burden will then be shifted, and if the latter rely on the document he must produce it (with the usual liability as to stamping) as part of his own case, even though he has served a notice to produce it on the plaintiff.

Examples.—As examples of the rule, the record, or a copy thereof, is the proper evidence of a judicial proceeding; and the statutory deposition of a witness or prisoner, the proper proof of what either has said (*Leach v. Simpson*, 5 M. & W. 309), though where no deposition, or an informal one, has been returned, parol evidence will be admissible (*R. v. Erdheim*, 1896, 2 Q. B. 260). So, where a private transaction is required by law to be in writing (*e.g.*, a will, contract under the Statute of Frauds, bill of sale, or policy of marine insurance), or where a contract, grant, or other disposition of property, though not so required, has been reduced to writing by *agreement of the parties* and intended by them to be complete and operative as such,—no extrinsic evidence is admissible to supersede the document, or to prove the transaction independently; and this rule applies, although the real terms had been acted on before reduction into writing (*Morris v. Delobbel-Flipo*, 1892, 2 Ch. 352), and, although the document itself is inadmissible, *e.g.*, a

bill of sale void for want of registration or stamp (*Exp. Parsons*, 16 Q. B. D. 532, 542).

Even between strangers, indeed, the *terms* of the transaction can only be shown by the production of the document itself and not by oral testimony. Thus, in an action by an execution creditor against the sheriff for withdrawing the execution, the sheriff was not allowed to ask the landlord the amount of rent due, it appearing that there was a lease which might have been produced (*Augustien v. Challis*, 1 Ex. 279). So, in a settlement case, the applicants having proved that a pauper occupied a tenement of £10 a year, the respondent attempted to prove by parol that the letting was to the pauper and two others, but on cross-examination, as it appeared that the letting was by writing, it was held necessary to produce it (*R. v. Rawden*, 8 B. & C. 708).

EXCEPTIONS.—(1) **Public Documents** are in general given no exclusive authority by law as instruments of evidence. Thus, an entry of marriage (*Evans v. Morgan*, 2 C. & J. 453), or of the nationality of a ship (*R. v. Seberg*, L. R. 1 C. C. R. 264) in a public register, will not exclude independent proof of these facts. (2) **Judicial Documents.** Although, as we have seen (*ante*, 173), the record, or a copy thereof, is the proper evidence of a judicial proceeding in all cases where strict proof is required, yet for less formal purposes alternative methods are allowed. Thus, where a previous conviction forms part of an offence charged, or is required to discredit a witness, a certificate of its substance or effect merely, will suffice; though, if written memorials exist, the oral testimony of a person who heard it will be rejected (*ante*, 170). So, under the Prevention of Crime Act, 1908, though the three statutory convictions necessary to constitute the defendant "an habitual criminal" must be strictly proved, yet additional convictions may be shown less formally (*R. v. Summers*, 10 Cr. App. R. 11). (3) **Private Documents when Collateral or Informal.** The rule, also, does not apply where the document is collateral or informal. Thus, payment

of a debt may be proved orally, although a cheque was given and a receipt (produced) taken (*Carmarthen Ry. v. Manchester Ry.*, L. R. 8 C. P. 685). So a written *order for goods*, insufficient under the Statute of Frauds, will not exclude parol evidence of the transaction (*Lockett v. Nicklin*, 2 Ex. 93). And (4) **The Existence as distinct from the terms of a transaction**, may be shown without production of the document, *e.g.*, the existence of a partnership (*Alderson v. Clay*, 1 Stark. 405); so, evidence may be given of a person having acted in a given capacity, without producing his written appointment (*ante*, 27).

CHAPTER XXVIII.

EXCLUSION OF EXTRINSIC EVIDENCE TO CONTRADICT,
VARY, OR ADD TO DOCUMENTS.

[574-604.]

WHEN a transaction has been reduced into writing, either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to *contradict, vary, add to, or subtract from*, the terms of the document.

Principle.—The grounds of exclusion commonly given are: (1) that when the law requires superior evidence, to admit inferior would be to nullify the law; and (2) that when the parties have deliberately put their agreement into writing, it is *conclusively presumed* between themselves and their privies that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.—The rule, however, is sometimes thought to be based on the “best evidence” principle; sometimes on the doctrine of estoppel; and sometimes on the substantive law.

EXCEPTIONS.—(1) **Public Documents**, but not judicial records, may be contradicted by parol, *e.g.*, the tonnage of a ship as stated in the register (*The Receipta*, 14 P. D. 131). So, also—

(2) **Private Documents when informal, or inter alios (a).**—Thus, a *receipt* may be contradicted, unless amounting to an estoppel (*Lee v. L. & Y. Ry.* 6 Ch. 527; *post*, 180). And where a transaction has been reduced into writing merely by agreement of the parties thereto, the document may be contradicted in

proceedings *inter alios*, for strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties; nor, in cases between a party and a stranger, will the former be precluded, since there would thus be no mutuality.

(3) **Private Formal Documents—Terms when may be supplemented** (b).—In three cases, the terms, even of private formal documents, may be supplemented, although not contradicted, by parol. (i) *Omitted Terms*.—Where a contract, not required by law to be in writing, purports to be contained in a document which the Court infers was not intended to express the *whole agreement* between the parties, proof may be given of any omitted term expressly or impliedly agreed between them *before* or at the *same time*, if it be not inconsistent with the documentary terms (Steph. art. 90; as to *subsequent* terms, see *post*, 180-1). [The question whether the writing was intended to contain the full agreement may be determined either by the document, or extrinsic circumstances, and may be left to the jury.]

(ii) *Collateral Agreements and Warranties*.—Moreover, although there exists a contract purporting to be fully expressed in writing, whether required by law to be so or not, proof may be given of a prior or contemporaneous oral agreement, or warranty, which forms part of the consideration for the main contract and is not inconsistent therewith (*Heilbut v. Buckleton*, 1913, A. C. 30, 47-51). And any affirmation made at the time of the contract is a warranty if so intended; but this intent must be deduced from the *whole* of the evidence, there being no arbitrary test (*id.*). The collateral contract must be between the same parties, and not include additional ones (*Hollinshed v. Devanc*, 49 Ir. L. T. R. 87; *Salmon v. Webb*, *post*, 182).

(iii) *Terms annexed by Usage or Law*.—Usage is, as we have seen, admissible to annex unexpressed incidents, not inconsistent with those expressed, to written contracts, grants, and wills, the presumption being that the whole terms were not intended to be expressed in the document, but that the customs of

the market or place were tacitly adopted (*ante*, 26). *Terms implied by law*, being judicially noticed, are not provable by parol; although they may in some cases be contradicted, or varied, thereby. Thus in contracts under the Sale of Goods Act, 1893, s. 55, such terms may be negatived or varied by express agreement, or the course of dealing between the parties, or by a usage which binds them both.

(4) **True Nature of Transaction, and Relationship of Parties** (c).—Extrinsic evidence (including, in some cases, direct declarations of intention) may in general be given to show the true nature of the transaction, or the legal relationship of the parties, although such evidence may contradict the instrument. **Sale or Mortgage.**—Thus a sale, absolute on its face, may be proved by extrinsic evidence to be a loan (*Maas v. Pepper*, 1905, A. C. 102); a conveyance, merely a mortgage (*Re Dk. of Marlborough*, 1894, 2 Ch. 133); or a joint advance to operate in common (*Re Jackson*, 34 Ch. D. 723). **Trusts.**—Again, although parol evidence is not admissible to show that an express trustee was intended to take beneficially (*Croome v. Croome*, 59 L. T. 582; *Re Huxtable*, *post*, 184), yet even where the document expressly negatives a trust, extrinsic evidence may generally be given to engraft one (*Re Spencer's Will*, 57 L. T. 519). And although trusts relating to land (other than resulting trusts) must by the St. of Frauds be evidenced by writing, the statute will not avail where retention of the land would be a fraud on the trust (*Re Dk. of Marlborough*, 1894, 2 Ch. 133). So, notwithstanding the Wills Act, a bequest absolute in terms may be proved to be subject to a *Secret Trust*, declared orally or in writing either before or after the execution of the will, provided the trust was communicated to, and accepted by, the trustee before the testator's death (*Re Boyes*, 26 Ch. D. 531). **Principal and Agent or Surety.**—Where it is doubtful whether a party signed a document as agent or as charging himself as well, his own declarations at the time are admissible (*Young v. Schuler*, 11 Q. B. D. 651). So, a party signing without quali-

fication could always in equity, and may now at law, prove that he signed as surety only (*Macdonald v. Whitfield*, 8 App. Cas. 733). **Parties to Bills.**—Similarly, the whole facts as to the making, issue, and transfer of a bill or note may be proved in order to ascertain the true relation to each other of those signing as makers or indorsers; and inferences of fact may be drawn to alter, qualify, or invert their relative liabilities according to the law merchant. Thus, the indorsees of a bill may be shown to be co-sureties, and so jointly, and not successively, liable (*ibid.*).

(5) **Conditional or Invalid Documents. Fraud. Mistake. Want of Consideration** (*d*).—Extrinsic evidence is admissible to prove any matter which by the substantive law affects the validity of a document, or entitles a party to any relief in respect thereof, notwithstanding that such evidence tends in some cases to contradict the writing—*e.g.*, conditional or defective execution, contractual incapacity, fraud, forgery, duress, undue influence, illegality of subject-matter, mistake, or want or failure of consideration.

Escrows.—Thus, a document may be shown to have been delivered merely as an escrow and subject to a condition through the non-fulfilment, or suspended fulfilment, of which no contract has ever arisen (*Pym v. Campbell*, 6 E. & B. 370; *Pattle v. Hornibrook*, 1897, 1 Ch. 25).

Fraud.—Fraud vitiates all instruments however solemn. Thus, proof that a party's signature to a bill was obtained by misrepresentation as to the nature of the instrument, is a defence even against a *bonâ fide* holder for value (*Lewis v. Clay*, 67 L. J. Q. B. 224).

Mistake. Rectification.—Mistake will in some, but not all, cases let in extrinsic evidence. Thus, *Judicial Records*, being presumed correct, cannot generally be rectified by parol, the proper course being to apply to amend the record (O. 28, r. 11). With regard to *Contracts*, recitals and descriptions of formal matters, or the date of execution of a deed, may generally be corrected by parol (*cp. post*, 192, 197-8). So, it may be shown that, by a mistake, the parties were never

really *ad idem*, and so did not validly contract at all (*Raffles v. Wichelhaus*, 2 H. & C. 906). And they may now, under the equitable jurisdiction of the Courts, and provided the claim be duly pleaded, apply, where the mistake is unilateral, for *rescission*, or where it is mutual, for *rectification*; parol evidence, which at common law would be wholly rejected, being for these purposes freely admissible (*Paget v. Marshall*, 28 Ch. D. 255; *Wilding v. Sanderson*, 1897, 2 Ch. 534; *Cowen v. Truefitt*, 1899, 2 Ch. 309). A party may now, also, prove mistake in the document by parol, and in the same action obtain specific performance of the contract so varied (*Thompson v. Hickman*, 1907, 1 Ch. 550). As to *Wills*, words inserted without the knowledge of the testator may be struck out by a Court of Probate (*ante*, 102), but omitted words may not be supplied (*Re Schott*, 1901, P. 190).

Consideration.—Want or failure of consideration may always be proved to impeach a written instrument not under seal, even though the words “for value received” are inserted. So, a past consideration may be shown to be contemporaneous or future (*Morrell v. Cowan*, 7 Ch. D. 151). And though a *deed* imports a consideration, yet where this fact comes in question it is generally allowable to inquire into it, notwithstanding any averment therein. Thus, where no consideration, or a nominal one only, is expressed, a valuable one may be proved (*Re Holland*, 1902, 2 Ch. p. 388; *Frith v. Frith*, 94 L. T. 383). Moreover, since the Judicature Act, the equity rule prevails, and as between the parties, the receipt for the consideration in the body of the deed, or even that indorsed, may always, unless the facts amount to an estoppel or a waiver, be contradicted; though this does not apply against transferees taking without notice and in reliance on such receipt (*Bickerton v. Walker*, 31 Ch. D. 151; *Bateman v. Hunt*, 1904, 2 K. B. 530; *Equitable Office v. Ching*, 76 L. J. P. C. 31; *cp. Conveyancing Act, 1881, ss. 54-5*).

(6) **Subsequent Modification or Rescission of Transaction**.—Written contracts *not required by law to be in*

writing may, at any time before breach, be modified or rescinded by parol (*Goss v. Nugent*, 5 B. & Ad. 58, 65). A written contract *required by law to be in writing* may also be *wholly rescinded* by a parol agreement, though itself unenforceable because not in writing, but cannot be *partially abandoned* or *varied* thereby (*Morris v. Baron*, 1918, A. C. 1; *Noble v. Ward*, L. R. 2 Ex. 135). Contracts by *deed* could, at common law, neither be *rescinded* nor *varied* by parol (*Steeds v. Steeds*, 22 Q. B. D. p. 539). Now, however, deeds, though they cannot technically be *released*, nor, it has been held, *varied* by parol (*Kellett v. Stockport*, 70 J. P. Rep. 154; *contra* Leake, Contracts, 5th ed. 570), may be *wholly discharged* by oral agreement, if made for valuable consideration (*Williams v. Stern*, 5 Q. B. D. 409). Bills and Notes may be discharged by writing, or delivery up (Bills of Exch. Act, 1882, ss. 62, 89); and Wills revoked by destruction, or later wills (*ante*, 102).

EXAMPLES.

(a) Documents Inter Alios.

Admissible.

A. leaves a fund in trust to pay the income to B. until he should assign it. Afterwards B. assigns the income to C. In an action between the trustees and B.;—held, extrinsic evidence was admissible to show that as between B. and C. the document, although on its face an assignment, was not intended as such, and that it would have been a fraud by C. to have so used it (*Re Sheward*, 1893, 3 Ch. 502).

Inadmissible.

A. sues B. on a bond signed by B. as surety and C. as debtor. Defence that A. had released C. by deed. Evidence in reply that B. orally agreed with A. that C.'s release was not to discharge B., Held inadmissible [*Cocks v. Nash*, 9 Bing. p. 346; and *cp. Merc. Bank of Sydney v. Taylor*, *post*, 195. In Equity, however, this rule is not always followed].

(b) Supplemental Terms.

Omitted Terms.—A. signs a railway note for the carriage of his cattle to N. station, but does not fill in the price. At the same time he orally agrees that the company should carry the

Omitted Terms.—A. insures goods with B., "In ship, or ships, from Surinam to London;"—evidence of a concurrent oral agreement to except a particular ship from the policy (*Weston v.*

Admissible.

cattle to a further station for a certain price. In an action against the company: Held, that both the further journey and the price could be proved, since they were supplemental to, and not contradictory of, the document (*Malpas v. L. & S. W. Ry.*, L. R. 1 C. P. 336).

A. proposes to engage B. as manager in a letter purporting to specify "the exact terms of the hiring." The only terms named related to B.'s salary and house-rent. B. accepts the offer by letter. A. may prove a prior oral agreement by which B. was not to solicit A.'s customers, since the document did not purport to contain the whole of the contract (*Robb v. Green*, 1895, 1 Q. B. 1).

A. sues B. on a bill drawn by A. and accepted by B. as executrix of C., deceased. B. may prove a separate document signed by A. at the time: "Received from B. an acceptance for £434, due August 4 next, which I promise to renew from time to time until sufficient effects are received from C.'s estate" [*Bowerbank v. Monteiro*, 4 Taunt. 844. *Aliter*, if the document, though contemporaneous with the bill, was not parcel of the same agreement; or was made with other parties as well (*Webb v. Spicer*, 13 Q. B. 894, *affid. sub nom. Salmon v. Webb*, 3 H. L. C. 510)].

Collateral Agreements.—A. grants a lease of land to B., reserving the sporting rights;—B. may prove a prior oral agree-

Inadmissible.

Emes, 1 Taunt. 115); or to show that the risk was only to begin from an intermediate port (*Kaines v. Knightly*, Skin. 54); or that B. knew of and assented to, a deviation (*Leduc v. Ward*, 20 Q. B. D. 475), is inadmissible.

A. and B. agree in writing that "B. shall enter A.'s service as foreman at a salary of £2 a week." Held, a weekly hiring; and evidence of an oral agreement made at the time that it was to be a yearly one, inadmissible (*Evans v. Roe*, L. R. 7 C. P. 138).

A. covenants to pay rent to B., each quarter in advance. A. parol agreement, at the time, that the rent might be paid by a three months' bill, is inadmissible, being inconsistent with the document, the word "payment" implying cash (*Henderson v. Arthur*, 1907, 1 K. B. 10).

A., the indorsee of a bill drawn by B., sues C., the acceptor. Evidence tendered by C. that at the time of accepting the bill it was orally agreed between B. and C. that if C. could not meet it at maturity, B. would renew it;—held inadmissible, although A. took the bill with notice of the agreement (*New London Credit Syndicate v. Nale*, 1898, 2 Q. B. 487; and the case would have been the same had the action been by B. against C.) So, also, an agreement not to present the bill till C. was twenty-five (*Orsman v. Robinson*, Times, Apr. 23, 1904).

Collateral Agreements.—A., an actor, agrees in writing with B., a manager, to act and understudy on tour for twenty-five

Admissible.

ment by which A. promised to keep down the rabbits if B. would sign the lease. [*Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, 8 Ch. App. 756, where the Court remarked that this was not a parol variation, but a distinct collateral promise forming part of the consideration for taking the lease, which latter was not intended to form the whole of the bargain between the parties.]

A. lets a house to B., the lease containing a covenant by A. to do outside, and by B. to do inside, repairs, but not mentioning the drains. At the time of completion B. had instructed his wife to refuse to hand over the counterpart executed by him unless A. guaranteed that the drains were in good order. A. thereupon stated that they were so, and B.'s wife handed over the counterpart. In a subsequent action by B., the drains having proved defective;—Held, that evidence of A.'s representation was admissible (1) as amounting to a warranty which had induced the tenancy; (2) being collateral to the lease, *i.e.*, entirely independent of what was going to happen during the tenancy, which was all that the lease dealt with; and (3) the lease not covering the whole contract between the parties (*De Lassalle v. Guildford*, 1901, 2 K. B. 215, C. A.).

Inadmissible.

weeks. A. may not prove an oral promise by B. that A. should perform in certain parts during the tour [*Grimston v. Cunningham*, 1894, 1 Q. B. 125; and *cp. Emery v. Parry*, *post*, 196, *Aliter*, if such promise had formed part of the consideration for the contract, *Newman v. Gatti*, 24 T. L. R. 18].

A., the publisher of a trade paper, agrees to insert B.'s advertisements and accept in payment goods manufactured by B. and invoiced at his lowest prices and discounts. Afterwards B. refuses to deliver the goods unless A. undertakes not to sell them in the United Kingdom. In an action by A. for non-delivery;—Held, that B. could not prove, as a collateral agreement, that A.'s agent had orally represented that A. only required the goods for shipment abroad or to the colonies (*Mercantile Agency v. Flitwick Co.*, 14 T. L. R. 90, H. L.).

(c) *True Nature of Transaction.*

Trusts.—B. buys an estate and takes an absolute conveyance thereof to himself. In an action against him by A., their own oral testimony and letters between them before and after the

Trusts.—A., by will, leaves B. "£4000 for the charitable purposes agreed on between us." Held, that though evidence by B. stating what were the particular purposes agreed on, was

Admissible.

conveyance, held admissible to show whether B. did, or did not, buy the estate in trust for A. (*Rochevoucauld v. Boustead*, 1897, 1 Ch. 196).

Inadmissible.

admissible, yet evidence (1) that no purposes had been agreed on; or (2) that the income only, and not the capital, of the £4000 was to be so devoted,—was not, since this contradicted the will (*Re Huxtable*, 1902, 1 Ch. 214; *ibid.* 2 Ch. 793).

(d) Conditional Instruments. Mistake. Consideration.

A. agrees in writing to buy B.'s interest in a certain patent. In an action by B. to enforce the agreement, A. may prove that it was orally agreed at the time that no sale was to take place unless A.'s engineer approved the patent, and that he did not approve it (*Pym v. Campbell*, 6 E. & B. 370).

B. signs an agreement in writing to take a lease of A.'s house. A. afterwards signs the agreement, but hands it to his solicitor with instructions not to part with it until B. obtains a responsible person to join her in the lease. In an action against A., he may prove these facts to show that there was no concluded contract between them (*Pattle v. Hornibrook*, 1897, 1 Ch. 25).

A. lets B. a house misdescribed as "38" Broad Street. In an action by B. against A. for excessive distress, B., to prove the correct rent produces the agreement, in which "38" has been altered (without A.'s knowledge, though it is not shown by whom) to "35," the true number. Held, that parol evidence was admissible to show that 38 was a mistake for 35, which was the only house owned by A. or let by him

A. makes a proposal to an insurance company, who, having accepted it, sign and seal a policy which they retain in their own possession until the premium is paid. The policy recites that the premium has been paid, but contains a proviso that no policy shall be valid until this is done. A loss having occurred,—Held, in an action on the policy, that there was a concluded, and not a merely conditional, agreement; and that evidence to contradict the recital of payment was inadmissible, since the company had waived the condition as to prepayment (*Roberts v. Security Co.*, 1897, 1 Q. B. 111, C. A. *Contra*, in *Equitable Office v. Ching*, 76 L. J. P. C. 31, where the Court held there was no waiver; no concluded contract till premium paid; and that non-payment might be proved).

A., in writing, lets B. a house at "*Thirty-six pounds ten shillings*" a year, reserving a right of re-entry upon non-payment of "*£6 12s. 6d.* a quarter." Afterwards, B. being in arrears for a quarter, A. *distrains* for £9 2s. 6d. In an action by B. for excessive distress (no application being made to rectify);—Held, conversations between A. and B. showing the rent agreed was £26 10s.,

Admissible.

to B.; that the alteration did not invalidate the agreement, and that even had it been void for the purpose of B. taking an interest or maintaining an action, it would have been admissible to prove a collateral fact such as the amount of rent [*Hutchins v. Scott*, 2 M. & W. 809].

Inadmissible.

not £36 10s.; and proof that the rent of adjoining houses was £26 10s.;—were inadmissible [*Villiers v. Skelton*, 49 Sol. Jo. 204; since (1) A. relied on the right to distrain, not the right to re-enter; and (2) the re-entry clause, though inconsistent with, did not affect, the clause defining the rent].

(e) Subsequent Modification or Rescission.

A. having agreed in writing to sell B. 500 pieces of cloth, sues him for the price of 223 pieces delivered. The action is compromised orally as follows. "A.'s account to stand over for 3 months. B. to have option to take balance of cloth." B. not paying in 3 months, A. sues again. B. admits A.'s claim, but counter-claims for non-delivery of the 277 pieces. Held, that B.'s claim failed, since the oral contract, being wholly inconsistent with the written one, was valid to rescind it, though itself unenforceable because not in writing (*Morris v. Baron*, 1918, A. C. 1).

A. lends B. money on a bill of sale, to be repaid by instalments. B. being unable to repay one of the instalments, A. agrees to give him a week's grace, but on the third day seizes and sells the goods. Held, that, had the oral agreement been made for valuable consideration, it would operate to waive the default, otherwise, which was the present case, it did not (*Williams v. Stern*, 5 Q. B. D. 409, C. A.).

A. agrees in writing to sell B. certain goods and deliver the same by a specified date. In an action by A. for non-acceptance, B. proves that before this date he and A. orally agreed to extend the time for delivery by a fortnight. Held, as the second agreement was unwritten, it was not enforceable *per se*; and as the intention was merely to vary the first contract, the second was inoperative to rescind it (*Noble v. Ward*, L. R. 2 Ex. 135. The parties had further agreed wholly to rescind a third contract between them; so that their intention as to second was clearly only to vary).

A. agrees in writing to sell B. certain lots of land and make a good title, and B. pays a deposit. Afterwards A. finds he cannot make a good title to one lot, whereupon B. verbally agrees to waive this and accept conveyance of the whole. In an action by A. for balance of purchase money, Held, that proof of the verbal waiver was inadmissible (*Goss v. Nugent*, 5 B. & Ad. 58; *aliter* if writing had not been required by law).

CHAPTER XXIX.

ADMISSION OF EXTRINSIC EVIDENCE IN AID OF
INTERPRETATION.

[605-665.]

WHERE the language of a document is clear and applies without difficulty to the facts of the case, extrinsic evidence is not admissible to affect its interpretation; but where it is peculiar, or its application to the facts is either ambiguous or inaccurate, extrinsic evidence may, subject to the qualifications hereinafter stated, be given to explain it.

Definition.—The terms “interpretation” and “construction” are in practice often used interchangeably (Steph. art. 91); sometimes, however, interpretation is considered to refer to the *sense* in which words have been used, and construction to the *application of the rules of law* to the instrument after that sense has been ascertained (Tay. s. 1201); and sometimes the former word is included in the latter (*Chatenay v. Brazilian Co.*, 1891, 1 Q. B. 79, 85, where Lindley, L.J., remarked that “construction” included first the meaning of the words, and secondly their legal effect, the former being a question of fact and the latter a question of law).

Object and Limits of Interpretation,—the Meaning of the Words, or the Intention of the Writer?—Two opposite theories are maintained as to the object of interpretation. The first, and most widely held, asserts that the question is, not what the writer meant, but simply what is the meaning of his words (*Wigram, Extr. Ev. ss. 9, 104, 124; Rickman v. Carstairs,*

5 B. & Ad. p. 663, *per* Denman, C.J.; *Grey v. Pearson*, 6 H. L. C. p. 106, *per* Ld. Wensleydale). The second regards the intention of the writer as the chief object of concern, and the mere grammatical and lexicographical meaning of the words as not strictly interpretation at all, since it is only (it is said) *after* the meaning of the words has been ascertained and has failed to explain the meaning of the writer, that interpretation, properly so called, begins,—*i.e.*, that the gap left by the partial failure of language to express the intention has to be filled by an inquiry into other indications thereof (Hawkins, 2 Jur. Soc. Pap. 301-310, 330; Thayer, Pr. Tr. Ev. 405). This is, in effect, the old controversy between the Proculians and the Sabinians, between the logical, inferential, or liberal school of interpreters, and the grammatical or literal; and, as often happens, the correct view would appear to lie between the extremes. It has been well said that the object of inquiry is not the meaning of the words alone, nor the meaning of the writer alone, but *the meaning of the words as used by the writer*. It is not the meaning of the words in the abstract, for the meaning of the words varies according to the circumstances under which they were used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what he meant to say, but did not, is foreign to the inquiry (Graves, 28 Am. L. Rev. p. 323).

As to the *limits* of interpretation: "All latitude of construction must submit to this restriction, that *the words may bear the sense* which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them" (*Gibson v. Minet*, 1 H. Bl. p. 615, *per* Eyre, C. B.).

Explanatory Evidence and Evidence of Intention.—

Pursuant to his view that the object of enquiry is the meaning of the words, and not the intention of the writer, Sir J. Wigram divides extrinsic evidence into two main classes: (1) Such as is "explanatory of the words themselves," and (2) Such as is "applied to prove intention itself as an independent fact;" and he

lays down the general rule that the former, *i.e.*, explanatory evidence, is always admissible, but that the latter, *i.e.*, evidence of intention, is never so, except in cases of equivocation (Extr. Ev. ss. 9-10, 212-215). Analysis shows, however, that this classification cannot be maintained; that all interpretative evidence is, in effect, evidence of intention, circumstantial or direct; and that what Wigram calls "explanatory evidence" is merely circumstantial evidence of intention under another name. With this modification, it may be accepted as true that, while *circumstantial evidence of intention* is, with sundry exceptions, generally admissible in aid of interpretation, *direct declarations of intention* by the writer are never so except in cases of equivocation (*supra*, Rule IV.; *cp. ante*, 102; *post*, 205-6).

The reasons for the exclusion of such declarations are partly historical, and partly based on the dangers of the evidence itself, owing to the ease with which it may be fabricated, retracted or misreported, and the aspect of rivalry it bears to the written document. Its admission in the single case of equivocation is a survival of the ancient practice of allowing an averment of intent in such cases because here alone "it would stand with the words;" the modern reasons assigned being that, although the document does not *ascertain* the object intended, yet it does *describe* it; the declarations, therefore, do not vary the instrument, but merely enable the Court to reject one of the subjects or objects in question by determining which of the two the writer understood to be signified by the words he has used (*Doe v. Needs*, 2 M. & W. 129; Wigram, s. 152; *post*, 194).

Ambiguities. Blanks. Equivocations. Inaccuracies.

—Bacon classed ambiguities as either *patent* or *latent*, the former arising where the instrument on its face is unintelligible, the latter where the words of the instrument are clear, but their application to the facts is doubtful.

His famous rule that "*ambiguitas patens* is never holpen by averment; but that if it be *ambiguitas latens*

then it is otherwise," which had reference merely to pleading upon instruments under seal, became afterwards erroneously propounded as a rule of evidence, viz. that parol evidence is admissible to explain a latent, but not a patent, ambiguity, and it is often so stated at the present day (*e.g.*, Ros. N. P. 32). The latter part of the proposition, however, is not generally true. Thus, although in a few cases of patent ambiguity extrinsic evidence is excluded, *e.g.*, where the name of a legatee is left *wholly* blank in a will (*Baylis v. A.-G.* 2 Atk. 239), or a bill names one sum in figures and another in words (*Saunderson v. Piper*, 5 Bing. N. C. 425); yet, in the great majority, it is receivable, *e.g.*, in the case of *partial* blanks (*Re De Rosaz*, 2 P. D. 66), or of a legatee referred to merely by a term of endearment or initial (*Sullivan v. Sullivan*, 1. R. 4 Eq. 457), or where the amount of a legacy is expressed by a cypher (*Kell v. Charmer*, 23 Beav. 195), or a document beginning "I, A.," is signed "B." (*Summers v. Moorhouse*, 13 Q. B. D. 388), or a legacy is left to "one of the children of A. by her late husband B.," since here it might be proved that A. had, to the knowledge of the testator, only one son by B. (Wigram, s. 79), or a gift is made to "my nephew John or Thomas," for the evidence might show that the nephew was known to the testator by both these names (*Elphinstone, Deeds*, 104).

The term, *latent ambiguity*, though sometimes used as synonymous with *equivocation*, *i.e.*, where the words apply to two or more objects equally, as where a legacy is given to "my niece Jane," and the testator has two nieces of that name (*post*, 193), is now generally employed to include *all* cases of doubtful meaning whether arising from *vagueness* or *generality* (Rule I.), *inaccuracy* (Rule III.), *equivocation* (Rule IV.), or *peculiarity of user* (Rule V.).

Strictly speaking, however, an inaccuracy is distinguishable from an ambiguity, for language may be inaccurate without being ambiguous—*e.g.*, where a testator, having only one house, a leasehold, devises it as his "freehold house;" or ambiguous without being

inaccurate, as in the above case of a legacy to his "niece Jane," where he had two nieces of that name; or both ambiguous and inaccurate, as where a testator, having only two nephews, John Smith and James Smith, leaves a legacy to his "nephew William Smith."

RULES AS TO EXTRINSIC EVIDENCE.—

Extrinsic evidence to interpret documents may be given in accordance with the following rules, which apply, in general, equally to wills and documents *inter vivos* (Tay. s. 1131 n.).

RULE I. (*Surrounding Circumstances*).—In order to show the identity or extent of the persons or property referred to in a document, or the sense in which particular words have been used therein, evidence of the knowledge and surrounding circumstances of the writer, as well as of his treatment of, and habits of speech concerning, such persons or property (but *not* of his direct declarations of intention) may be received. Such evidence, however, is not admissible (1) where the words are unambiguous, or the ambiguity is merely a grammatical one; (2) where the language is so vague or imperfect that to admit extrinsic evidence would be, not to interpret the document, but virtually to make a new one; or (3) where the meaning or application sought to be proved would conflict with some rule of law or construction [Wigram Prop. V. (in 1st ed., Prop. I.); Tay. ss. 1194-1200; Steph. art. 91 (4)].

Principle.—The principle is, that as most documents refer expressly or impliedly to the circumstances under which they were written, the Court, when called upon to interpret them, should be placed as nearly as possible in the same situation as the writer (*Charter v. Charter*, L. R. 7 H. L. 364). While, as to the degree of certainty required, the maxim is that, *id certum est quod certum reddi potest*.

RULE II. (*Primary and Secondary Meanings. Correct and Less Correct Names and Descriptions*).—(a) When the words of a document, in their primary or ordinary sense, are applicable to the facts, and are not modified by the context, extrinsic evidence cannot be given to show that they were not used in that sense; but

(b) where it is clear, either from the context or the facts, that such meaning cannot have been intended, extrinsic evidence (including surrounding circumstances, treatment, and habits of speech, but *not* direct declarations of intention) may be given to show that they were used in some secondary or less ordinary sense, provided it is one which the words can properly bear. [Wigram, Props. II. & III.; Steph. art. 91 (2) and (5).]

Scope.—Rule I. included cases where the words, being vague or general, were equally capable of a wide or a narrow meaning. The present rule deals with words having a proper and also a less proper sense or application. Thus, evidence is not receivable to explain statutory words of weight, measure, or quantity (*Smith v. Wilson*, 3 B. & Ad. 728, 731). So, in the case of persons, words of relationship import legitimate relationship; if, therefore, legitimate members exist, evidence cannot, in general, be given that illegitimates were intended (*Hill v. Crook*, L. R. 6 H. L. 265; *Re Pearce*, 1914, 1 Ch. 254, C. A.); though if none do, or can, exist (*id.*; *Dorin v. D.*, L. R. 7 H. L. 568), or if, though some exist, the context may include the latter, such evidence will be receivable. Again, if a given person, known to the testator, accurately fulfils the words in the will, and there is no one else in competition, evidence cannot be given to show that such person was not intended (*Sherratt v. Mountford*, L. R. 8 Ch. 928); and, if one of two competitors accurately fulfils the words, and the other does not, evidence in favour of the latter will be rejected unless the presumption in his favour is extraordinarily strong (*National Soc. v. Scottish National Soc.*, 1915, A. C. 207). So, in the case of *property*, where proof has been given of a subject-matter satisfying all the terms of a written description, the maxim *non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram* applies, and extrinsic evidence cannot be given to show that something more or less extensive was intended (*Horwood v. Griffith*, 4 De G. M. & G. 700, 708; *Hardwick v. Hardwick*, 16 Eq. 168, 175; *Re Seal*, 1894, 1 Ch. 316).

RULE III. (*Incorrect Descriptions*).—When the words of a document apply in part correctly, and in part incorrectly, to some single subject-matter, extrinsic evidence (including surrounding circumstances, treatment, and habits of speech, but *not* direct declarations of intention) may be given to show whether they were, or were not, intended by the writer to apply thereto; and when the words apply partly to one subject-matter, and partly to another, but correctly to neither, similar evidence may be given to show which of the two was intended [Wigram, Prop. III.; Prop. V., s. 100; and see ss. 212-4; Steph. art. 91 (7)].

Principle and Scope.—The principle of the rule is expressed in the maxims—*Veritas nominis tollit errorem demonstrationem; nihil facit error nominis cum de corpore constat; falsa demonstratio non nocet cum de corpore constat*. Thus, where the identity or extent of the subject-matter is in question, evidence of the kind indicated above is admissible, not merely that a person or thing *exists* to which the document might refer, but also that such person or thing was in fact *intended* by the writer; and this applies whether a single subject-matter only is involved, *e.g.*, a legatee whose name is correct but description incorrect, or *vice versâ* (Theobald, Wills, 7th ed., 268; *Simmonds v. Woodward*, 1892, A. C. 100, 105-6); or whether there are several in competition, *e.g.*, two legatees answering different parts of the same name or description, or one answering the name and the other the description (*Charter v. Charter*, L. R. 7 H. L. 364; *Cloak v. Hammond*, 34 Ch. D. 255). So, in the case of *property*. Thus, a devise of “freeholds” will pass leaseholds, if that is all the testator had. But where the extent is doubtful, the test of whether the words are a limitation under Rule II., or a false demonstration under the present Rule, has been stated as follows: “If all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence. But if they do not fit with accuracy, the whole thing must be looked at fairly to see what are the leading words of description, and what is the subordinate matter, and

for this purpose extrinsic evidence is admissible" (*Hardwick v. Hardwick*, 16 Eq. 168, 175, *per* Lord Selborne).

RULE IV. (*Equivocations*).—When the language of a document, though intended to apply to one person or thing only, applies equally to two or more, and it is impossible to gather from the context which was intended, an *equivocation* arises, and, in addition to the evidence admissible under former rules, direct declarations of the writer's intention may be given to solve the ambiguity [Wigram, Prop. VII.; Steph. art. 91 (8); *ante*, 187-8].

What are Equivocations.—An equivocation may arise where the same name or description (1) fits two persons or things accurately; or (2) fits one accurately and the other popularly, but less accurately, *e.g.*, the same name borne by both father and son (*Jones v. Newman*, 1 W. Bl. 60), or by one accurately, and the other in a transposed order (*Henderson v. H.*, 1905, 1 I. R. 353, 362), or by one solely, and the other together with additional names (*Bennett v. Marshall*, 2 K. & J. 740), or, perhaps, in the case of a nephew or niece, where one is related by blood, and the other by marriage (*Grant v. Grant*, L. R. 5 C. P. 727; *sed qu.*), the distinction between such cases and those falling under Rule II. being often very slight; or (3) where it fits two objects equally, but subject to a common inaccuracy, provided that the inaccuracy be a mere blank, or applicable to no other person or thing, for then the Court can reject the inaccuracy as *falsa demonstratio* and the residue will form a true equivocation (*Doe v. Hiscocks*, 5 M. & W. 363, 370; *Re Hubbuck*, 1905, P. 129, 135). On the other hand, there is no equivocation (1) where there are legitimate and illegitimate relations of the same degree (*Re Fish*, 1894, 2 Ch. 83); for the case then falls under Rule II.; nor (2) where part of a name or description applies to one subject and the remainder to another (*Doe v. Hiscocks*, *supra*); for the case then falls under Rule III.

Declarations of Intention.—Though the intention to be proved is that existing at *the time* of the execution of the document, the declarations themselves may have been made either *before, at, or after* the execution of the document, although contemporaneous declarations, will, of course, be entitled to the most weight (*Doe v. Hiscocks*, 5 M. & W. p. 368). Such evidence, however, is not receivable when the equivocation can be solved either by the context alone (*Doe v. Westlake*, 4 B. & Ald. 57); or, perhaps, by the surrounding circumstances without recourse to the declarations (*Healy v. Healy*, 1 R. 9 Eq. 418; *contra Phelan v. Slattery*, 19 L. R. I. 177); and it is probably only receivable to show *which* of the subjects was intended, and not that *both or all* were, since this would vary the document (*Richardson v. Watson*, 4 B. & Ad. 787). [*Cp. ante*, 187-8.]

RULE V.—*Usage. Course of Dealing. Experts. Dictionaries.*—Where particular terms have a double meaning, the one common, and the other local or peculiar, evidence of the latter is admissible, provided the context or surrounding circumstances point to such a user by the parties (*Holt v. Collyer*, 16 Ch. D. 718; *Dashwood v. Magniac*, 1891, 3 Ch. 306). So, where the meaning of a document is doubtful, but not when it is plain, the course of dealing between the parties, as well as, whether the document be ancient or modern, *contemporanea expositio*, are admissible to explain it (*N.E. Ry. v. Hastings*, 1900, A. C. 260; *Van Diemen's Land Co. v. Table Cape Board*, 1906, A. C. 92). And the testimony of experts (*ante*, 117), or reference to accredited dictionaries (*ante*, 115), is similarly admissible to explain technical, local, or foreign terms.

RULE VI.—Where the language of a document, aided as above by extrinsic evidence, is insufficient to determine the writer's meaning, the document will, unless the defect can be cured by construction or election, be void for uncertainty [*Steph. art. 91 (3); Wigram, Prop. VI.; Elphinstone, Deeds, 105*].

EXAMPLES.

RULE I.

*Surrounding Circumstances.**Admissible.*

A. appoints as his executor "Percival —, of Brighton, Esq., the father." Evidence that A. knew two persons called Percival Boxall, father and son, both of whom lived at Brighton, was admitted, probate being granted to the former [*Re De Rosaz*, 2 P. D. 66; if the words "the father" had been omitted, an *equivocation* would have arisen and declarations of intent have been also receivable under Rule IV., *post*; *cp. Re Hubbuck*, *post*, 199].

A., a farmer, sues B. for non-acceptance under a contract signed by B. to take "*your wool* at 16s. a stone." B.'s defence is that A. tendered wool partly from *other* farmers. Held, that a letter from A. to B.'s agent offering to sell a quantity of wool, partly of his own clip and partly that of other farmers, and a later letter (both before the contract) stating that he had sold part of his own clip, but was promised other wool which would go with his own, were admissible to show that, in the contemplation of the parties, "*your wool*" included both classes (*Macdonald v. Longbottom*, 1 E. & E. 977).

A., a railway engineer, sued B., a bank, on a contract for the construction of a new line by which A. was to receive extra commission "on the estimate of £35,000 if he succeeded in reducing the *total cost of the works* below £30,000." A. succeeded in reducing the total cost of the *works*, but not of both works and

Inadmissible.

A. leaves a legacy to "Mr. —," and another to "Lady —;" extrinsic evidence is not admissible to fill up the blanks (*Re De Rosaz*, *opposite*, and cases cited).

A bank releases A., a debtor, from "all debts due by A. to the bank at this date." A., at the time, owed the bank unsecured debts and also one which B. had guaranteed to the bank for A.—In an action by the bank against B. on this guarantee, Held, that the bank could not give evidence of conversations between its manager and A. at the time of the release, showing the release was only intended to apply to the unsecured debts and not to the one secured by B. [*Merc. Bank of Sydney v. Taylor*, 1893, A. C. 317; see *Cocks v. Nash*, *ante*, 181].

A. being owed money by B. for printing a certain periodical, declines to bring out the next number unless with C.'s guarantee. C. thereupon signs and gives A. the following document:—"If you will bring out the present number, I will repeat my guarantee to see you paid in full. Held, that though the relationship of the parties and the existence of B.'s indebted-

Admissible.

land together, below £30,000. Held, that conversations and letters between A. and B. before the contract, and a prior circular issued by B. to the public and shown to A. inviting capital on the basis of "the estimated cost of the line being £35,000," were admissible, not to vary the contract, but to show that the subject-matter referred to by the parties embraced both works and land [*Bank of N. Zealand v. Simpson*, 1900, A. C. 182].

Inadmissible.

edness might be proved as surrounding circumstances, A. could not, under this head, prove that C. had previously given him an oral guarantee for the whole of B.'s debt, and that the written guarantee was given in substitution for the oral one (*Bunning v. Odham*, 75 L. T. 602, H. L.).

A., a manager, engages B., an actor, at £10 a week during the run of the piece. Evidence that before the contract A. agreed to make the run of the piece eight weeks at least, held inadmissible to explain the phrase [*Emery v. Parry*, 17 L. T. 152; *cp. Grimston v. Cunningham*, ante, 183].

RULE II.

*Primary Meanings. Correct Names and Descriptions.**Admissible.*

A. left property to his "children." He had no children of his own, but had four step-daughters. Evidence that they lived with him, adopted his surname, were known in the neighbourhood as his children, and were so treated and called by him, and that they called him "father," held admissible, and that they were entitled to the property (*Re Jeans*, 72 L. T. 835).

A testator appointed his "nephew George Ashton" to be his executor. He had both a legitimate and illegitimate nephew of that name. Held, as he had, in other parts of his will, spoken of his legitimate and illegitimate relations indiscriminately as his "relations," parol evidence was admissible to show that the illegitimate nephew was intended [*Re Ash-*

Inadmissible.

A testator leaves a legacy to "his children," having at the date of the will both legitimate and illegitimate children. The former alone take, and extrinsic evidence to show that he intended the latter is inadmissible (*Ellis v. Houston*, 10 Ch. D. 236).

A. leaves property to his "nephews and nieces." A. had none, but his wife had both. Held, that these took, and that, there being no one claiming in competition, evidence of unfriendly treatment by A., or of direct declarations by him that they were not intended, was inadmissible (*Sherratt v. Mountford*, L. R. 8 Ch. 928).

A. left property to "his niece E. W." Neither A. nor his wife had any nieces, but his wife had two grandnieces called E. W., one of whom was legitimate and

Admissible.

ton, 1892, P. 83; following *Seal-Hayne v. Jodrell*, 1891, A. C. 304, where, however, no question of evidence arose].

A. left an annuity to his "brother Edward Parsons for life, and afterwards equally to his children by his present wife." A brother, Edward Parsons, and his wife, had to A.'s knowledge both died before the date of the will, and their children took other legacies thereunder, but another brother, Samuel Parsons, who had a wife and children, claimed the annuity—Held, evidence that he was the only brother alive at the date of the will, and that A. often called him "Edward" and "Ned," was admissible, and that he took the annuity (*Parsons v. Parsons*, 1 Ves. J. 265; *cp. Charter v. Charter*, &c., *post*, 198).

Inadmissible.

the other illegitimate.—Held, that, there being no equivocation, the legitimate one took, and evidence that the other lived in the house with A. and was habitually called by him "his niece," was not receivable (*Re Fish*, 1894, 2 Ch. 83 C. A.).

A. who had illegitimate children by B., afterwards married her and then by will left his property to B. for life and then to his "children by B." A. died soon after, having no other children. Held, that the illegitimates could not take, as, at the date of the will, there was a possibility of legitimate children (*Dorin v. D.*, L. R. 7 H. L. 265; *Re Pearce*, 1914, 1 Ch. 254, C. A.).

A. leaves a legacy to the "National Society for Prevention of Cruelty to Children." There was an English society precisely so named, and a Scotch one with the prefix "Scottish" to the same title. Held, the former took; and evidence that A. was a domiciled Scotchman, whose will was in Scotch form, and all the other legacies were to Scotch charities, that his brother was a director of the Scotch society and that the English one did not operate in Scotland, nor was it apparently known to A., was, even if admissible, insufficient to oust the correct title (*National Society v. Scottish National Society*, 1915, A. C. 207).

RULE III.

Incorrect Names and Descriptions.

Admissible.

A voting-paper beginning "I, the undersigned A." was signed "B." Evidence by the town

Inadmissible.

Admissible.

clerk that he gave A.'s paper by mistake to B., who signed it without noticing the mistake, was admitted to explain the patent ambiguity and validate the vote (*Summers v. Moorhouse*, 13 Q. B. D. 388).

A. leaves a legacy to "the daughters of my late friend Ignatius Scoles, deceased."—A. had no deceased friend of that name, but had a friend Ignatius Scoles, a priest, unmarried and alive, who had several sisters, all the children of Joseph Scoles, who was dead at the date of the will. Evidence of former wills made by A. in which legacies were left to the daughters of Joseph Scoles, architect, was admitted to show that father and daughters were both known to A., and so inferentially that the latter, though misdescribed, were intended (*Re Waller*, 80 L. T. 701, C.A.; *Re Ofner*, 1909, 1 Ch. 60, C. A.).

A. appointed his "son Forster Charter" his executor. One of A.'s sons, who had died before the execution of the will, had been so called; but A.'s only living sons were William Forster Charter and Charles Charter. Evidence that William Forster had quarrelled with his father and for many years lived away from home, and was habitually called by his father "William" or "Willie" and not "Forster;" while Charles lived at home and helped his father to work the farm, was received to show that the latter, and not the former, was intended (*Charter v. Charter*, L. R. 7 H. L. 364; *Stringer v. Gardiner*, 4 De G. & J. 468).

Inadmissible.

In *Re Waller*, *opposite*, the former wills were rejected as declarations of intention by A. to benefit the daughters of Joseph Scoles.

A. devises land to "John Hiscocks, the eldest son of John Hiscocks." The latter had two sons, Simon his eldest, and John, his second son, who, however, was the eldest son by a second marriage. Held, that though the circumstances of the family might be proved, yet, as there was no equivocation, evidence of instructions given by A. for his will, and declarations made by him after its execution, were not admissible to show which of the two was intended [*Doe v. Hiscocks*, 5 M. & W. 363. Similar declarations were rejected in *Charter v. Charter*, *opposite*].

RULE IV.

Equivocations.

Admissible.

A. sold goods to B. "to arrive *ex Peerless* from Bombay." Evidence was admitted that there were two ships of that name, and that A. intended one and B. the other [*Raffles v. Wichelhaus*, 2 H. & C. 906; here, the parties not being *ad idem*, it was held no contract].

A. devises property to "my grandson Robert William Henderson." A. had two grandsons, one Robert William Henderson and the other William Robert Henderson. Held, that an equivocation arose, and declarations of intent by A. were admissible to show to which he referred (*Henderson v. Henderson*, 1905, 1 I. R. 353).

A. devised property to "William Marshall, my second cousin." The testator had no second cousin of that name, but had two first cousins once removed, one called William Marshall, and the other William J. R. B. Marshall. Held, declarations of intention were admissible to remove the doubt (*Bennett v. Marshall*, 2 K. & J. 740).

A. appointed as her executrix "my granddaughter ——" A. had at the date of her will and death three granddaughters. Held, that as the case involved only a partial, and not a complete, blank, extrinsic evidence, including declarations of intent by A. was admissible to identify the particular granddaughter referred to [*Re Hubbuck*, 1905, P. 129; *cp. Re De Rosaz, ante*, 195].

Inadmissible.

A. sues B. for non-delivery of "60 tons of *Ware* potatoes at £5 a ton" which B. had contracted to sell him. Evidence of persons in the trade that "*Wares*" were the largest and best potatoes in the trade, having been received, further evidence, viz., that A. had contracted for "*Regent's*" wares, whereas B. had tendered an inferior kind called "*kidney*" wares, was rejected, there being no equivocation, since "*wares*" meant only *one* sort, the best, and not *two* sorts (*Smith v. Jeffryes*, 15 M. & W. 561).

A. devised to "Matthew Westlake, my brother, and to Simon Westlake, my brother's son, my house called S., jointly and severally." It was proved that A. had three brothers, Thomas, Richard, and Matthew, each of whom had a son called Simon. Held,—it being clear on the construction that A. was speaking of the son of that brother who was then particularly in his mind,—there was no ambiguity and evidence of A.'s declarations in favour of Richard's son was inadmissible (*Doe v. Westlake*, 4 B. & Ald. 57).

A. devised land to "my wife Alice for life, and after her death to Margaret M.; and I give the use of £500 stock for *her* natural life, but after *her* death among the brothers and sisters of my said wife." Held, that evidence was not admissible to show whether "*her*" referred to the wife or Margaret M.; but, upon the construction, that it referred to the wife (*Castledon v. Turner*, 3 Atkyns, 257).

RULE V.

*Usage. Course of Dealing. Experts.**Admissible.*

Usage.—Evidence of usage has been held admissible to interpret the following words:—The usages of the House of Commons, to explain the meaning of, and formalities involved in, taking an oath “solemnly and publicly” pursuant to the Parliamentary Oaths Act, 1866 (*A.-G. v. Bradlaugh*, 14 Q. B. D. 667, C. A.); a theatrical usage to show that the word “year” in a contract means those parts of the year during which the theatre was open (*Grant v. Maddox*, 15 M. & W. 737); a mercantile usage to show that “months” in a charter-party meant calendar and not lunar months (*Jolly v. Young*, 1 Esp. 186; *Simpson v. Margitson*, 11 Q. B. 23); or that “October” in a contract of marine insurance, meant from the 25th to the 31st of that month (*Chaurand v. Angerstein*, Peake Rep. 43). So, usage is admissible to show that in a lease of a rabbit warren the words “thousand rabbits” meant, in that particular part of the country, twelve hundred (*Smith v. Wilson*, 3 B. & Ad. 728).

A. devises an estate to B. together with “a power to cut timber for the repairs of the estate.” Evidence of local usage is admissible not only (1) to show what trees are included in the term “timber” in that locality; but also (2) to show that such a power includes a power to cut and sell timber for the personal benefit of B. (*Dashwood v. Magniac*, 1891, 3 Ch. 306, C. A.).

Inadmissible.

Usage.—Evidence of usage has been held inadmissible to interpret the following words:—That words of weight, measure, or number, having a statutory meaning attached to them, were not used in that meaning (*Smith v. Wilson*, 3 B. & Ad. 728, 731-4; *O'Donnell v. O'Donnell*, 13 L. R. I. 226; the statutory meaning may, however, be excluded by the express terms of the document, *Tay. s. 1165*). So, evidence of local usage is inadmissible to show that the terms “Lady Day,” or “Michaelmas,” in a lease (made since the Act for altering the style) relate not to March 25 and September 29, but to the old style (*Doe v. Lea*, 11 East, 312; *Doe v. Benson*, 4 B. & Ald. 588).

A. let B. a shop, the latter covenanting not to use it as “a public-house, tavern, or beer-house.” B. used it principally as a grocery, but also sold beer to be drunk off the premises. In an action by A. for breach of covenant, evidence of a usage in the trade that “beer-house” included such a shop: Held, inadmissible, the lease being an ordinary one, and not a trade instrument between brewers and publicans (*Holt v. Collyer*, 16 Ch. D. 718).

A testator, in several places in his will, used the word “close” in its ordinary sense of “inclosure”; held, evidence was not admissible of a usage in that part of the country that close meant “farm” [*Richardson v. Watson*, 4 B. & Ad. 787, 799; *aliter*, if the context had not so limited its meaning].

Admissible.

Course of Dealing.—A. sues B. for non-delivery of goods which B. had contracted by bill of lading "to deliver safely at the port of London to A." The goods having been lost by fire after landing, but before receipt by A., evidence is tendered by A. that, in previous transactions between them, the course of dealing had always been for B. to deliver the goods by cart to A.'s London warehouse. Held, admissible, not to extend, narrow, or vary the written contract, but to construe the word *deliver*, in anticipation of a case which, though not in fact pleaded, might be made by B., that by a custom of the port mere landing was a good delivery [*Bourne v. Gatliff*, 11 C. & F. 45, 70-1].

The question being as to the meaning of "Pacific ports" in a policy of marine insurance;—evidence that the course of dealing between the parties in similar contracts was to treat the words as confined to ports on the west coast of the Pacific, is admissible (*Royal Exchange Co. v. Tod*, 8 T. L. R. 669).

Experts.—The question being whether a legacy of a sculptor's "mod tools for carving" meant modelling tools for carving, or moulds, or models;—the opinions of statuary were admitted to prove that there were no such tools known as modelling tools for carving, and that the word "mod" would be understood by a sculptor as an abbreviation for models (*Goblet v. Beechey*, 3 Sim. 24; 2 Rus. & Myl. 624).

Inadmissible.

Course of Dealing.—A. by deed in 1854 granted leave to B. (a railway company) to make a railway through his land, B. agreeing to pay a certain rent on all coal carried over "any part of the railways comprehended in their Act and shipped at C."—In an action by A. for such rent : Held, the words being unambiguous, evidence that for forty years B. had paid and A. accepted rent only on such coal, shipped at C., as passed over A.'s land, was not admissible, to disentitle A. to rent on all coal, shipped at C., over parts of B.'s railways not passing over A.'s land (*N.E. Ry. Co. v. Hastings*, 1900, A. C. 260).

The question being whether an Act, which provided for "daily" testings of gas-meters, was intended to include Sunday testings, evidence of a practice by the parties only to test on weekdays, held inadmissible (*L.C.C. v. South Met. Gas. Co.*, 1904, 1 Ch. 76).

Experts.—The question being as to what lands acquired by a railway company were "delineated" upon statutory plans;—the opinions of engineers on the point are not admissible, the word being intelligible to ordinary readers (*Dowling v. Pontypool Co.*, 18 Eq. 714). Nor are the opinions of surveyors admissible as to the meaning of "nominal rent" under the Income Tax Acts (*Camden v. Commissioners of Income Tax*, ante, 119).

BOOK III.

EFFECT OF EVIDENCE.

CHAPTER XXX.

WEIGHT OF EVIDENCE. PRESUMPTIONS. ESTOPPELS.

[676-687.]

WEIGHT OF EVIDENCE.—The weight of evidence cannot, like its admissibility, be determined by arbitrary rules, since it depends on common sense, logic and experience. But valuable aid in this connection is often provided by the rules as to burden of proof; *e.g.*, where the scales are even, the plaintiff or prosecutor, and not the defendant, must lose, since he will have failed to establish his case by a preponderance of probability, or beyond reasonable doubt, as the case may be; so, where either party has a presumption of law in his favour, he must win unless his opponent is able to rebut it (*ante*, 5, 10-11). Juries also derive important assistance from the judge's direction as to when corroboration is required (*ante*, 154-7); that statements may be evidence for some purposes and not for others (*ante*, 17, 25, 38, 60); that direct testimony is to be preferred to speculative opinion (*ante*, 118; as to the relative cogency of direct and circumstantial evidence, see *ante*, 2); and that facts not cross-examined to may, in general, be taken as admitted (*ante*, 150).

PRESUMPTIONS.—Presumptions are, as we have seen, either of law or fact; and when of law, may be either conclusive, *præsumptiones juris et de jure*, or rebuttable, *præsumptiones juris*, but when of fact, *præsumptiones hominis*, are always rebuttable (*ante*, 4). Mixed presumptions are those which are partly of law and partly of fact. Conflicting presumptions neutralize each other, and the case must then be determined solely on the evidence adduced (*ante*, 11).

Conclusive Presumptions of Law.—The modern tendency being to contract the range of all arbitrary rules affecting the weight of evidence, and to leave questions of fact to be determined by the probabilities of the particular case, many presumptions of law, which in early times were considered indisputable, have since been relegated to the category either of rebuttable presumptions of law, or of mere presumptions or inferences of fact (Best, s. 307). Indeed, it has been doubted whether there can, in strictness, be such a thing as a conclusive presumption, or whether a perfect specimen of the class exists. In many cases, at all events, these so-called presumptions are rules which belong, properly speaking, to the substantive law, and not to the law of evidence. Thus, the presumption that an infant under seven is incapable of committing a felony, or that all men know the law (*i.e.*, that ignorance of law is no excuse for crime), belong to the criminal law.

Rebuttable Presumptions of Law.—Disputable presumptions of law differ from presumptions of fact in that they (1) derive their force from *law* and not from *logic*; (2) are drawn by the *Court* and not by the *jury*; and (3) apply to a *class* and not to *individual cases*. In practice, however, these distinctions are by no means easy to apply; and the line of demarcation, even when visible, is often overlooked. A presumption which is regarded by some judges and text-writers as one of law, is treated by others as one of fact; indeed, the same judges not infrequently place the same presumption in different categories at different times. The principal function of a rebuttable presumption of

law is to determine upon whom the burden of proof rests, using that term in the sense of introducing evidence (*ante*, 11).

The following are some of the chief presumptions usually included under this head:—

Legitimacy.—It is a rebuttable presumption of law that a child, proved to have been born during lawful wedlock, is legitimate; and this presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities (*Bosvile v. A.-G.*, 12 P. D. 177; *Burnaby v. Baillie*, 42 Ch. D. 282). Proof that access between husband and wife at the necessary time was impossible, or highly improbable, will rebut the presumption (*ibid.*); but neither the testimony, nor declarations out of Court of the parents, can be received for this purpose (*ante*, 54); unless indeed the latter be tendered merely as a part of their general conduct, and not as evidence of the facts stated (*Aylesford Peerage*, 11 App. Cas. 1).

Marriage.—A *prima facie* presumption of an equally strong character is, except in cases of bigamy or divorce, made by law in favour of the validity of a marriage proved to have been celebrated *de facto* (*Sastry Velaider v. Sembecutty*, 6 App. Cas. 364); and mere co-habitation may raise such a presumption, unless the contrary be clearly proved (*Re Shepherd*, 1904, 1 Ch. 456).

Life. Death. Survivorship. Issue. There is no presumption of law as to the continuance of life (*ante*, 25); but a person proved to have been alive at a given date may, if nothing further is shown, be presumed as a *fact* to have continued so for a reasonable time afterwards, *e.g.*, eleven years (*R. v. Willshire*, 6 Q. B. D. 366). On the other hand, if proved not to have been heard of for *seven years* by those who, if he had been alive, would be likely to have heard of him, he is presumed by *law* to be dead; though there is no presumption as to the time during the seven years at which he died (*Re Phené's Trusts*, 5 Ch. App. 139; *Wills v. Palmer*, 53 W. R. 169); nor that he

died without issue (*Re Jackson*, 1907, 2 Ch. 354); nor as to survivorship in the case of *commorientes*, i.e., two or more persons who have perished in a common disaster (*Wing v. Angrave*, 8 H. L. C. 183; *Re Beynon*, 1901, P. 141).

Innocence.—In the absence of evidence, innocence of crime is said to be presumed by law; at all events, the burden of proof is cast upon the party asserting criminality. Children under seven are incapable of committing a felony; but between seven and fourteen, there is merely a rebuttable presumption of innocence, since here *malitia supplet ætatem* (*R. v. Lockley*, 47 Sol. Jo. 123).

Omnia præsumuntur rite esse acta.—This presumption, which is nearly akin to that of innocence, is chiefly applied to judicial and official acts; and, though sometimes conclusive (see, e.g., as to the correctness of records, and the due execution of ancient documents), is in general only rebuttable. Thus, the constant performance of divine service from an early period in a chapel raises a presumption of its due consecration (*R. v. Cresswell*, 1 Q. B. D. 446).

Probable Consequences of Acts.—It is a presumption of law, generally rebuttable but sometimes conclusive, that sane persons intend the probable consequences of their acts (*R. v. Beard*, 1920, A. C. 479; *R. v. Meade*, 1900, 1 K. B. 895); though this applies only to intentional, and not to accidental, acts (*R. v. Davies*, 29 T. L. R. 150).

Presumptions affecting Documents.—*Date*: It is a presumption, though merely a *primâ facie* one, disprovable by evidence, that all documents were made on the day they bear date (*ante*, 179). As to the presumptions respecting *sealing, delivery, attestation and alterations*, see *ante*, 159-61).

Rebutting Presumptions (*a*).—Where any presumption, legal or equitable, arises against the apparent intention of a document, extrinsic evidence (including declarations of intention by the author) is admissible to rebut, or, in answer to such rebutting evidence only, to support the presumption [666-675].

EXAMPLES.

Admissible.

(a) A., testator, having made a settlement upon his daughter at her marriage, subsequently leaves her a legacy by his will. To rebut the presumption against double portions, declarations by the testator that he intended the legacy to be in addition to, and not in satisfaction of, the provisions in the settlement are admissible (*Re Tussaud*, 9 Ch. D. 363, C. A.).

Inadmissible.

(a) A. lodges certain securities at a bank in the joint name of himself and his daughter. After his death a memorandum, dated fifteen months subsequently to the deposit, is found, in which he directs the securities to be applied for other purposes. This memorandum is not admissible to rebut the presumption that the money is a gift (*O'Brien v. Sheil*, Ir. R. 7 Eq. 255; *Williams v. Williams*, 32 Beav. 370; *aliter* if the declarations had been made contemporaneously with the deposit, since the question was what was the intention at the time of the transaction, not what it was subsequently. It should be remembered, however, that a party's intention at a given time may generally be proved by his prior or subsequent *acts* (*ante*, 39), and sometimes by his prior or subsequent *declarations* (*ante*, 100-1).

- **Presumptions of Fact.**—Presumptions of fact are, as we have seen, simply logical inferences of the existence of one fact from the proof of another. They are the inferences or presumptions which render circumstantial evidence admissible, and have already been considered under the head of relevancy and relevant facts.—Presumptions of fact of the more cogent kind will, as we have seen, shift the burden of proof, no less than rebuttable presumptions of law (*ante*, 11).

ESTOPPELS.—An estoppel is a rule whereby a party is precluded from denying the existence of some state of facts which he has previously asserted.

It is sometimes said to be a rule of evidence, since an action cannot be founded thereon; but as a defence can, it often has the effect of a rule of law; moreover, estoppels must be pleaded, and evidence must not.

Estoppels have also been variously treated as conclusive presumptions of law (Tay. s. 89); as solemn admissions (2 Sm. L. C. 11th ed. 744); and as conclusive evidence. They are, however, distinguishable from the first, in that an estoppel may be waived, from the second as well as the first, in that it cannot in general be taken advantage of by strangers; and from the third, in that the conclusiveness of evidence may result from mere logical cogency, while, when it results from some rule of law, it operates against strangers as well as against parties. Estoppels may arise (1) By Record; (2) By Deed; (3) By agreement; or (4) By Conduct, *i.e.*, Misrepresentation or Negligence.

(1) **Estoppels by Record.**—The chief of these are Judgments (*ante*, chap. XXI.) and Letters Patent (*Cropper v. Smith*, 26 Ch. D. 712-13).

(2) **Estoppels by Deed.**—Where a party has entered into a solemn engagement by deed as to certain facts, neither he, nor his privies, are permitted to deny them.

This only applies, however, in actions on the deed, and with respect to recitals and descriptions which are material and intended to bind. And no estoppel arises where the deed is fraudulent or invalid.

(3) **Estoppels by Agreement.**—The following are common examples of this class of estoppel:—*Landlord and Tenant.*—A landlord who has granted a lease, whether by deed or not, is estopped from alleging his want of title to the premises. And conversely, a tenant, or lodger, or the alienee of either, cannot, during his possession of the premises, deny the title either of his landlord, or the latter's heirs (*Weeks v. Birch*, 69 L. T. 759). But the tenant may show that such title has expired (*Serjeant v. Nash*, 1903, 2 K. B. 304); or that a parcel of land about which he and the lessor are disputing was never comprised in the lease at all (*Clark v. Adie*, 2 App. Cas. p. 435); or that he has been evicted by title paramount to his landlord's (*Gouldsworth v. Knights*, 11 M. & W. p. 344). Mere receipt or payment of rent, however, though raising

a strong presumption of tenancy, does not of itself operate as an estoppel (*Serjeant v. Nash, supra*).

Bailor and Bailee.—A bailee is estopped from denying that his bailor had, at the time of the bailment, authority to make it (*Gosling v. Birnie*, 7 Bing. 339); but when the bailee is evicted by title paramount he can, with the consent of the evictor, set up the latter's title against the bailor (*Rogers v. Lambert*, 24 Q. B. D. 573).

Licensor and Licensee.—A licensee of a patent cannot dispute the validity of the patent as against the licensor. But he may show its expiry (*Muirhead v. Commercial Co.*, 29 L. Jo. 298); or that what he has done does not fall within the scope of the patent if properly construed (*Clark v. Adie*, 2 App. Cas. 423).

(4) **Estoppels by Conduct: Misrepresentation, Negligence.**—An estoppel by conduct may arise from an untrue representation of fact, not only when fraudulently, but even when innocently, made (*Vagliano v. Bank of England*, 1891, A. C. 107). And conduct by negligence, omission, or even silence, where there is a duty cast upon the person to disclose the truth, may often have the same effect (*ibid.*; *Freeman v. Cooke*, 2 Ex. 654).

In order to raise such an estoppel there must have been a clear and unambiguous statement of fact; an intention that the injured party should act thereon; and a detriment suffered as the natural consequence of so acting (*ibid.*; *Re Lewis*, 1904, 2 Ch. 655).

APPENDIX.*

CRIMINAL EVIDENCE ACT, 1898.

(61 & 62 VICT. CH. 36.)

An Act to amend the Law of Evidence.

[August 12, 1898.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Com-
petency of
witnesses
in criminal
cases.

- (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application.
- (b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:
- (c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:
- (d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:
- (e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-

* The various provisions of this Act are fully treated in the text at pp. 136-40.

examination notwithstanding that it would tend to criminate him as to the offence charged :

- (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ; or

(iii) he has given evidence against any other person charged with the same offence.

- (g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence :

- (h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

4.—(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence, and without the consent of the person charged.

(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

11 & 12
Vict. c. 42.

Evidence
of person
charged.

Right of
reply.

Calling of
wife or
husband in
certain
cases.

5. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

Application of Act to Scotland.
50 & 51
Vict. c. 35.

6.—(1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

Provision as to previous Acts.
40 & 41
Vict. c. 14.

(2) But this Act shall not apply to proceedings in courts martial unless so applied—

(a) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

29 & 30
Vict. c. 109.

(b) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.

44 & 45
Vict. c. 58.

7.—(1) This Act shall not extend to Ireland.

Extent, commencement, and short title.

(2) This Act shall come into operation on the expiration of two months from the passing thereof.

(3) This Act may be cited as the Criminal Evidence Act, 1898.

SCHEDULE.

Section 4.

ENACTMENTS REFERRED TO.

Session and Chapter.	Short title.	Enactments referred to.
5 Geo. IV. c. 83 ...	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83 ...	The Poor Law (Scotland) Act, 1845.	Section eighty.
24 & 25 Vict. c. 100	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

OATHS ACT, 1909.

(9 EDW. 7, c. 39.)

A.D. 1909. An Act to amend the Law as to Oaths.

[25th November, 1909.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

51 & 52

Vict. c. 46.

Manner of
adminis-
tration of
oaths.

1. This Act may be cited for all purposes as the Oaths Act, 1909; and the Oaths Act, 1888, and this Act may be cited together as the Oaths Act, 1888 and 1909.

2.—(1) Any oath may be administered and taken in the form and manner following:—

The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his up-lifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that . . .", followed by the words of the oath prescribed by law.

(2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question:

Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful.

Definition.

3. In this Act the word "officer" shall mean and include any and every person duly authorized to administer oaths.

Commence-
ment and
extent.

4.—(1) This Act shall come into operation on the first day of January nineteen hundred and ten.

(2) This Act shall not apply to Scotland.

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